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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 786

JAMES C. DAVIS, FEDERAL AGENT FOR CLAIMS DUE IN OPERATION OF ATLANTIC COAST LINE RAILROAD COMPANY, PETITIONER,

vs.

R. H. PRINGLE, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF CHARLES F. BOYD COMPANY, INC., BANKRUPT

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 12, 1934

CERTIORARI GRANTED MARCH 4, 1935

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 16, 1925

[fol. 1] **IN UNITED STATES DISTRICT COURT**

CAPTION

THE UNITED STATES OF AMERICA,
Eastern District of South Carolina,
In the District Court, To-wit:
In Bankruptcy.

At a District Court of the United States for the Eastern District of South Carolina, begun and held at the Court House in the City of Columbia, S. C., on the third Tuesday of January, being the fifteenth day of the same month in the year of our Lord, one thousand nine hundred and twenty-four.

Present: The Honorable Ernest F. Cochran, United States District Judge for the Eastern District of South Carolina, presiding at Columbia, S. C., and the Honorable Henry A. M. Smith, United States Judge, presiding at Charleston, S. C.

Among other were the following proceedings, to-wit:
In the matter of Charles F. Boyd Company, Inc., Bankrupt.
Ex Parte: James C. Davis, Federal Agent for claims due in operation of Atlantic Coast Line Railroad Company.

IN UNITED STATES DISTRICT COURT

PETITION OF JAMES C. DAVIS, FEDERAL AGENT

To the Honorable the said Court:

The Petition of James C. Davis, Federal Agent, respectfully shows:

[fol. 2] First. That at the time of the accrual of the indebtedness hereinafter set forth the Atlantic Coast Line Railroad Company was being operated under Federal control by the Director General then in office, and that there accrued during the said time Two Thousand Two Hundred Thirteen and 70/100 Dollars ($2,213.70) for freight, storage and demurrage, the Proof of Debt for which has already been filed in this proceeding.

Second. Your Petitioner further alleges that under the law, this indebtedness and claim, being in favor of the United States, and so accrued during Federal control, is a debt due to the United States, and therefore is a preferred claim, and a debt due the public to be paid out of the assets of the bankrupt estate in priority over other claims proved in said case.

Wherefore your Petitioner prays that said amount be so paid as such prior and preferred claim.

Rutledge, Hyde & Mann, Attorneys for Petitioner.

Petition verified.

IN UNITED STATES DISTRICT COURT

ORDER OF L. K. LEGGE, SPECIAL REFEREE—Filed August 21, 1922

On August 20th, 1920, Charles F. Boyd Company, Inc., was adjudicated bankrupt. On February 23rd, 1921, John Barton Payne, Federal Agent, filed in the cause two claims for freight, storage and demurrage earned by the Atlantic Coast Line Railroad, as follows:

(a) Claim for demurrage accruing on and betwen April 19th, 1918, and June 10th, 1918,—$1,883.87.

(b) Claim for freight, storage and demurrage accruing on and between April 29th, 1918, and August 27th, 1918, $329.83.

[fol. 3] These claims were filed as unsecured claims in the usual form, duly itemized, and no claim for priority as to them was made at that time.

On September 28th, 1920, there was filed on behalf of the Seaboard Air Line Railway a Proof of Unsecured Claim for

"Freight, storage and demurrage on shipment of ground hulls from Willich & Co., New Orleans, La., to Charles F. Boyd & Co.," in the amount of $2,207.43. This claim was not itemized other than stated. On February 6th, 1922, counsel for the Seaboard Air Line Railway Company requested by letter that the claim last above referred to be listed as entitled to priority under Section 3466 of the Revised Statutes of the United States. Thereafter, on February 9th, 1922, counsel for James C. Davis, Federal Agent, filed a notice of appointment of James C. Davis as Federal Agent in the place of John Barton Payne, and also to the effect that the claims theretofore filed in the name of John Barton Payne, and first above referred to, were entitled to priority as debts due the United States.

After due notice a hearing was had before me on May 29th, 1922, at which time the attention of counsel representing the claim of Seaboard Air Line Railway Company was directed to the fact that the claim as filed made no mention of the date or dates of its accrual, and that there was, therefore, nothing in the record to show that this claim had accrued during the period of Federal control. The hearing was thereupon adjourned in order that counsel might file such amended Proofs of Claim and Petitions for priority as they might be advised.

Subsequently, on July 27th, 1922, there was filed on behalf of James C. Davis, Federal Agent, a Petition for priority as to the two claims first above referred to, as accruing during the period of Federal control of the lines of the Atlantic Coast Line Railroad Company. On August 2nd, 1922, I notified counsel for the Seaboard Air Line Railway Company that more than two months had elapsed since the adjournment of the hearing on May 29th, for the purpose of enabling them to file an amended Proof of Claim, and requested that their claim be gotten in such shape as to be properly before me for a decision on the merits. No amended Proof of Claim has been

[fol. 4] filed, however, and, as the record now stands, there is nothing to show when this claim accrued.

The sole question presented before me is whether, under the provisions of the Revised Statutes, Section 3466, and the Bankrupt Act of 1898, these claims are entitled to priority. So far as concerns the claims for freight, storage and demurrage accruing on the lines of the Atlantic Coast Line Railroad, it is admitted that those claims accrued during the period of Federal control. As to the claims for freight, storage and demurrage on the lines of the Seaboard Air Line Railway Company, there is, as I have already stated, nothing before me to show when the alleged indebtedness arose, and the claim for priority might very probably be dismissed for that reason. Realizing, however, that under the principle "nullum tempus occurrit regi," this claim may eventually be so amended as to show that it accrued during the period of Federal control, I shall so regard it for the purposes of this decision, as the present cause has been pending now for nearly two years and should, in the interest of all concerned, be terminated without further delay.

Prior to the Bankrupt Act of 1898, there was no doubt but that all claims of the United States, whether for taxes or otherwise, were entitled to priority, in view of the provisions of the Revised Statutes, Section 3466, and because of the further fact that the Federal Government was not bound by the then existing Bankruptcy Law.

Lewis vs. United States, 92 U. S. 618; United States vs. Herron, 20 Wall. 51; Harrison vs. Storey, 5 Cranch. 289; United States vs. Dallas, 140 U. S. 632; Redfield vs. Parks, 132 U. S. 239.

By the Bankrupt Act of 1898, however, the United States must, except as to claims for taxes, be considered as having assumed the position of a general creditor only (Guarantee Title & Trust Co., Trustee, vs. Title Guarantee & Surety Co., 224 U. S. 152).

The question in the case last cited was as to the priority of payment out of a bankrupt estate of a claim due the United States on a Bond, and a claim for wages due a laborer. The Court considered [fol. 5] the Act of March 3rd, 1797 (Revised Statutes Sec. 3466) in its relation to the Bankrupts Acts of 1867 and 1898, and reached the conclusion that, while the Bankrupt Act of 1867 and the Act of March 3rd, 1797 (Revised Statutes, Section 3466) by both of which debts due the United States were given priority over all other claims, were in pari materia, the latter Act affirming the former, yet the Bankrupt Act of 1898 with its change of provisions regarding priority, was not in affirmation of Revised Statutes, Section 3466, and indicated a change of purpose in that respect. The Court held accordingly that, in spite of the provisions of Revised Statutes, Section 3466, claims of the United States, other than for taxes, are, since the Bankrupt Act of 1898, not entitled to priority over labor claims. In considering the effect of the provisions of Section 64 of the Bankrupt Act of 1898, the Court said:

"It will be seen therefore that by the Statute of 1797 (now Section 3466) and Section 5101 of the Revised Statutes all debts due to the United States were expressly given priority to the wages due

any operative, clerk or house servant. A different order is pre scribed by the Act of 1898 and something more. Labor claims ar given priority and it is provided that debts having priority shall b paid in full. The only exception is "taxes legally due and owin by the bankrupt to the United States, State, County, District or Muni cipality." These were civil obligations, not personal conventions and preference was given to them, but as to debts we may assum a change of purpose in the change of Act. And we cannot say tha it was inadvertent. The Act takes into consideration, we think, th whole range of indebtedness of the Bankrupt National, State an individual, and assigns the order of payment. The policy whic dicated it was beneficient, and well might induce a postponemen of the claims even of the sovereign in favor of those who necessaril depend upon their daily labor. And to give such claims priorit could in no case seriously affect the sovereign. To deny them prior ity would in all cases seriously affect the claimants."

So in the case of Lott vs. Salsbury, 237 Federal 191, the Circui [fol. 6] Court of Appeals for the Fourth Circuit, referring to th above decision, says:

"The United States, except for taxes due, has not, in (5) th enactment of the Bankruptcy Law, exercised its sovereign right o providing a preference for its own claims against the Bankrupt * * * The Government has, except as to taxes, put itself in th plight of an ordinary unsecured creditor."

See also in re: Jacobsen, 263 Fed. 881.

It would seem, therefore, that no reliance can be placed by th United States upon Revised Statutes, Section 3466, in support o its claim to priority, but that its claim to priority must be sustained if at all, by the provisions of the Bankruptcy Act of 1898.

It is contended on the part of the Government that these claims ar entitled to priority under Revised Statutes, Section 3466, by virtu of subdivision 5 of Section 64 (b) of the Bankrupt Act of 189 which gives priority to "debts owing to any person who by the law of the States of the United States is entitled to priority." Wit this view I cannot concur. Revised Statutes, Section 3466, wa enacted in 1797, amended in 1799, and has never since been changed Is it to be broadened by implication to include debts incurred i purely commercial transactions in which the United States has aban doned its sovereign character?

In the recent case of Krichman vs. United States, 41 Sup. Ct 514, the Defendant was indicted for offering a bribe to a Railroad porter employed on the Pennsylvania Railroad while it was under Federal control, the indictment being under Section 39 of the Crim inal Code of the United States, making it an offense to offer a brib to an officer of the United States, or to a person acting for or on be half of the United States in an official function under or by the au thority of a department or office of the government. The Supreme Court held that the indictment would not lie. In considering th Statute creating the offense, the Court said:

"The Statute creating the offense was passed long before there [fol. 7] was any thought of the Government taking over the Railroads. That does not prevent its application if the thing done offends against it. It is, however, a circumstance proper to be considered in determining whether the situation is one intended to be dealt with by Congress."

In the present case the Statute relied upon to sustain the claim for priority was passed more than a century ago and has remained practically unmodified. The language quoted above applies with equal force in consideration of the question involved here.

An examination of the Proclamation and Acts of Congress relating to Federal control shows that, while the control by the Government was absolute, it extended only so far as to give "complete possession by governmental authority to replace, for the period of the war, the private ownership theretofore existing." (Northern Pacific Railway vs. North Dakota, 250 U. S. 135).

While all the earnings of the railroad were by the Act expressly made the property of the United States, this was only "for the purpose of enabling the United States to perform the obligations that it assumed and to secure it from ultimate loss." Ibid.

In construing the Federal Control Act, the Supreme Court, in the case of Missouri Pacific Railroad vs. Ault, 256 U. S. 554, says:

"The plain purpose of the above provision was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President, except in so far as such rights and remedies might interfere with the needs of Federal operation * * * The substantial legal rights of persons having dealings with the carriers were not to be affected."

It is clear that to give the United States priority in cases such as the present would interfere with the substantial legal rights of the public.

As a general proposition when the Government enters into commercial business it is to be treated as any other private citizen. [fol. 8] United States vs. Planters Bank, 9 Wheat. 904; Salas vs. United States, 234 Fed. 842; Pope vs. United States Shipping Board, 269 Fed. 319; United States vs. Strang, 254 U. S. 494.

Under the construction of the Federal Control Act, in the cases of Northern Pacific Railway vs. North Dakota, and Missouri Pacific Railway vs. Ault, and United States vs. Strang above referred to, it is clear that it was never the intention of Congress, in taking over the Railroads, to extend the power and prerogatives of the United States as a sovereign beyond that which was essential to prevent interference with their uninterrupted operation for war purposes. When we consider the decisions with reference to the United States Shipping Board Emergency Fleet Corporation, this becomes all the more evident. It is true that the war powers of the United States with reference to ocean transportation were handled through a corporation in which all of the stock was owned by the United States,

whereas with reference to land transportation, they were handled through the Director General of Railroads. Each, however, in spite of differences as to legal status, was the agency adopted by the government for the conduct of certain necessary commercial enterprises under its war powers.

It would indeed be anomalous if it should be held that the government had priority as to debts for freight charges earned in land transportation, but had no such priority with reference to freight charges earned in ocean transportation. And yet, such would be the case if the contention of the government is sustained here.

In the case of United States Emergency Fleet Corporation vs Wood, 42 Sup. Ct. 386, decided on May 1st, 1922 the Court holds point blank that, in spite of the exclusive ownership by the United States, the Fleet Corporation stood like other creditors and was not to be preferred. The language of the Chief Justice in an opinion concurred in by Justices Van Deventer and Clarke, which concurs with the main opinion of the Court in the result as to this question is most significant on the particular point involved here. The opinion in this case really involves the decision of three separate cases against the Emergency Fleet Corporation. The main opinion by [fol. 9] Justice Holmes decided that suits against the Fleet Corporation were not suits against the United States. The concurring and dissenting opinion of the Chief Justice holds that suits against the Fleet Corporation should be regarded as suits against the United States. Nevertheless, and in spite of this view, the Chief Justice concurs in the majority opinion denying priority for claims of the Fleet Corporation in Bankruptcy, and, while he does not cite the case of the Guarantee Title & Trust Co., Trustee, vs. Title Guarantee & Surety Co., above referred to, his reasons for reaching this conclusion coincide exactly with the reasoning of the Supreme Court in that case. Says the Chief Justice:

"As to the preference claimed against a bankrupt estate in No 526 by the Fleet Corporation, I concur in the conclusion of the Court that it cannot be allowed under the Statute as to preferences in Bankruptcy, because I do not think that it extends to claims of the United States except those for taxes."

The Government relies upon two decisions of the Circuit Court of Appeals as conclusive of its claim:

In re Hibner Oil Company, 264 Fed. 667; Davis vs. Pullen, 27 Fed. 650.

At first glance both of these cases would seem to be (8) conclusive of the questions involved. Upon closer examination, however, in the light of the cases above referred to, neither the Hibner case nor the Pullen case can be considered as controlling authority on the point involved here.

In the Hibner case the only question considered by the Court was whether a claim for freight charges constituted a debt due the United States. No question appears to have been made in that case as to the right of the United States to priority, nor was the decision of the

Supreme Court concerning the effect of the Bankrupt Act of 1898 on the right of the government to priority as to claims other than taxes (Guarantee Title & Trust Co., Trustee, vs. Title Guarantee & Surety Co., supra) even considered. The Court said:

[fol. 10] "If the claim is 'property' and constituted a debt due to the United States then concededly its priority was properly found * * * The claim for freight charges is 'property' derived from the operation of the carrier during Federal control and is thus 'property' of and therefore a debt due to the United States. As such it was entitled to priority as found."

There is of course no doubt but the freight claimed is a debt due the United States (Northern Pacific Railway vs. North Dakota 250 U. S. 135; Missouri Pacific Railway vs. Ault—256 U. S. 554). It by no means follows, however, that it is "as such" entitled to priority. On the contrary, the decisions referred to above show clearly that it is not.

In the case of Davis vs. Pullen, a creditor's bill had been filed and a Receiver appointed for a corporation thought to be temporarily embarrassed, but which turned out to be insolvent. The Director General filed a claim with the Receiver for freight charges accruing during the period of Federal control, and contended that this claim was entitled to priority under Revised Statutes, Section 3466, as debts due the United States. The main question involved was whether the appointment of a Receiver constituted an act which would bring into operation the provisions of Section 3466 of the Revised Statutes relative to debts due the United States. Both the Master and the District Court held that the case was not a bankrupcy or insolvency proceeding within the meaning of Section 3466. The holding of the lower Court was reversed.

The Court further considered the questions:

(a) Whether the freight claims were debts due the United States.

(b) Whether, if debts due the United States, they were entitled to priority.

Basing its decision on the Hibner case and on the (9) Supreme Court decisions in Northern Pacific Railway vs. North Dakota, supra, and Missouri Pacific Railway vs. Ault, supra, the Court held the [fol. 11] claims to be debts due the United States.

On the question of priority, the Court decided in favor of the contention of the government, basing its decision on the following cases:

United States vs. National Surety Company, 254 U. S. 73; Marshall vs. New York, 254 U. S. 380; Lewis vs. United States, 92 U. S. 618; United States vs. Barnes, 31 Fed. 705; United States vs. State Bank of North Carolina, 6 Pet. 29; New Jersey vs. Anderson, 203 U. S. 483; Richmond vs. Bird, 249 U. S. 174; Pennsylvania Cement Co. vs. Bradley Contracting Co., 274 Fed. 1003; In re Hibner Oil Co., 264 Fed. 697.

Under these decisions it says:

"In the light of these authorities we must hold the Statute (i. e., Revised Statutes, Section 3466) applicable to all debts due the United States."

It is significant that the Court, in reference to the contention of the Receiver that, even if the freight claims were debts due the United States, nevertheless such claims were not entitled to priority within the meaning of the Statute, used the following language:

"There is a certain obvious injustice in giving the United States, when engaged in an industrial and commercial venture, even although under war powers, superior rights over other creditors bearing like relations to insolvents."

It is a remarkable fact that the Court entirely overlooked the Supreme Court decision in the case of Guarantee Title & Trust Co. vs. Title Guarantee and Surety Co., 224 U. S. 152, and the decision of the Circuit Court of Appeals for the Fourth Circuit in the case of Lott vs. Salsbury, 237 Fed. 191, referred to above. The only apparent reason for so obvious an omission is that the Pullen case was not a proceeding in bankruptcy, and that the Bankrupt Law, there-[fol. 12] fore, did not apply. If this was the reason for the omission, the logical conclusion would be that the Pullen case is not to be taken as authority in construing Section 3466 as applied to proceedings in bankruptcy. In other words, even if Section 3466 applies to all debts due the United States, that Section is not to be given this extended construction when the question arises in a bankruptcy proceeding where the controlling authority with reference to debts due the United States is no longer Section 3466 of the Revised Statutes, but the Bankruptcy Act of 1898. Apart from (10) that view, however, it seems to me that the decisions relied upon in the Pullen case do not sustain the conclusion there reached that Section 3466 is applicable to "all debts due the United States," so as to include a claim for freight charges earned in the operation of the railroads by the government under its war powers and in pursuance of the Federal Control Act and the Proclamations issued by the President.

The case of the United States vs. National Surety Co., 254 U. S. 73, arose out of Bonds given to secure contracts entered into by a contractor with the United States. The contractor defaulted, and the United States, having lost thereby Thirteen Thousand Dollars ($13,000.00), the Surety Company paid to the government on account of this loss Three Thousand One Hundred Fifty Dollars ($3,150.00). Both the United States and the Surety Company proved their claims in the Bankruptcy proceedings, the government claiming priority over all creditors under Revised Statutes, Section 3466, and the Surety Company claiming a like priority by subrogation under Revised Statutes, Section 3468, providing that, when a surety pays to the United States money due upon a bond, such Surety is subrogated to the claims of the United States.

The Court held that the United States was entitled to priority for its whole debt as against the Surety Company.

It is true that language is used in the opinion of the Court which, considered alone, gives to Revised Statutes, Section 3466, the same broad scope that it had prior to the Bankrupt Act of 1898. Taken together with the decision of the Supreme Court in the case of Guar-
[fol. 13] antee Title & Trust Company, Trustee, vs. Title Guarantee & Surety Co., supra, however, this language must be construed in the light of the fact that the only question being considered by the Court was the relative meaning of Section 3466 and Section 3468 without reference to the effect of the Bankrupt Act of 1898 on the scope of those Sections, and certainly throws no light on the question in issue here.

The case of Marshall vs. New York, 254 U. S. 380, was a suit in equity against a corporation, in which the State of New York claimed priority as to certain franchise taxes and license fees. The sole question involved in the case was as to the prerogative right of the State as a sovereign to claim priority over all its subjects in the payment of debts due it. The only debts involved in the case were taxes, and the decision is based on the sovereign common law right of the State, independent of all Statutes.

The case of Lewis, Trustee, vs. United States, 92 U. S. (11) 618, involved the question of priority as to claims of the United States against the individual members and the firm of Jay Cook & Company, Bankrupt, for moneys which the United States had placed in the hands of the firm for disbursement. The fundamental decision in this case was that the then existing bankruptcy Act (i. e. Bankrupt Act of 1867), in no wise bound the United States, so that Section 3466 of the Revised Statutes was without qualification. Since the Bankrupt Act of 1898, however, Section 3466 of the Revised Statutes is qualified and controlled by the latter Act, as has already been noted in the discussion of the case of Guarantee Title & Trust Co., Trustee, vs. Title Guarantee & Surety Co., supra, in which decision the Lewis case was fully discussed. Since the case of Guarantee Title & Trust Co., Trusteess, vs. Title Guarantee & Surety Co., therefore, the Lewis case can no longer be regarded as controlling authority even as to the construction of Section 3466 of the Revised Statutes.

The decision in the United States vs. Barnes, 31 Fed. 795, related to the priority of a judgment under the Customs Revenue Laws against the Bankrupt and is based directly on the case of Lewis vs. United States, supra.

In the case of United States vs. State Bank of North Carolina, 6 [fol. 14] Pet. 29, the question involved was whether, under the Revised Statutes, Section 3466, the priority given to the United States applied to a Bond which did not become due until after the General Assignment for the benefit of Creditors. The Court held that it did apply. There was no question in this case under any Bankrupt Act.

In the case of New Jersey vs. Anderson, 203 U. S. 483, the question involved was whether a license fee imposed by a State on corporations organized under its laws was included in Section 64 (a) of the

Bankrupt Act of 1898 giving priority to taxes due a State. This case is therefore no authority on the question involved here.

In the case of Richmond vs. Bird, 249 U. S. 174, the question was as to the priority of a claim of the City of Richmond for taxes as against the claim of a landlord who had distrained for rent. The Court held that as under the laws of Virginia no superior right was given to the City's unsecured claim for taxes, the landlord's claim was entitled to priority.

In the case of Pennsylvania Cement Co. vs. Bradley Contracting Co., 274 Fed. 1003, Receivers appointed in a suit in equity desired to declare a dividend and filed a Petition for instructions as to the attitude of the government regarding taxes under the Income Tax Law. The Court held that it had no power to compel the government to declare its attitude upon the subject, and the Receivers were instructed to pay no dividend until further ordered.

The case of in re: Hibner Oil Co., 264 Fed. 667, has already been referred to.

It will thus be seen that of the nine cases relied on for the decision of the Court in the Pullen case, four involved the question of taxes, one Customs Revenue, one the recovery of money deposited by the government with the Bankrupt, one the right to priority on a Custom House Bond, the case not being in Bankruptcy, one the relative rights of the United States and a Surety Company under Section 3468 of the Revised Statutes, and, in the last (In re Hibner), the question of priority was not raised. Necessarily the language used by the Court in these cases must be referred to the questions at issue and under consideration, and I am forced to the conclusion, [fol. 15] with all deference to the learned Court of Appeals, that the decision in the Pullen case is sustained neither by reason nor by the authorities relied on by the Court, and is not in harmony with the decision of the Supreme Court above referred to.

It is therefore ordered that the Petitions for priority be and they are hereby dismissed.

Lionel K. Legge, Special Referee.

Charleston, S. C., August 21, 1922.

In United States District Court

Petition for Review of Referee's Order—Filed September 6, 1922

To the Honorable Henry A. M. Smith, Judge of the said Court:

The Petition of James C. Davis, Federal Agent, respectfully shows:

First. That heretofore your Petitioner, having filed his Proof of Debt, also filed his Petition in which he claimed priority over other creditors of the bankrupt estate by reason of the fact that the amount so claimed by him, to-wit, two thousand two hundred thirteen and

70/100 dollars ($2,213,70) was for freight, storage and demurrage accrued against the bankrupts while the Atlantic Coast Line Railroad Company was being operated under Federal control, and thereafter his Petition and Proof of Debt were referred to Lionel K. Legge, Esq., as Special Referee, to inquire into and report upon the same.

Second. That said Special Referee has filed his Order in which he disallows the claim of your Petitioner for priority as aforesaid.

Third. That such Order is erroneous upon the following grounds:

[fol. 16] (a) The Special Referee erred in holding that the claim of the Petitioner for freight, storage and demurrage was not a claim against the United States and entitled to priority under the provisions of Section 3466, Revised Statutes of the United States.

(b) The Special Referee erred in holding that the claim of the Petitioner for freight, storage and demurrage was not a preferred claim and entitled to priority under the provisions of the Bankrupt Act of Congress.

And your Petitioner alleges that as to both grounds the Special Referee was in error because it is undisputed that during the time when said freight, storage and demurrage accrued, Atlantic Coast Line Railroad Company was being operated by the Director General under Federal control; that the revenue arising therefrom became the property of the United States under legislation adopted by Congress, and that the bankrupt estate was therefore responsible to the proper representative of the United States for all such unpaid charges in priority to the other creditors.

Wherefore your Petitioner feeling aggrieved because of such Order, prays that the same may be reviewed as provided in the Acts of Congress relating to bankruptcy and General Order 27.

Rutledge, Hyde & Mann, Attorneys for Petitioner.

(Petition verified.)

In United States District Court

Order of United States District Judge Approving Order of Special Referee—Filed January 15, 1924

This matter came on to be heard upon the Special Referee's certificate filed 9 September, 1922, and the petition for Review of the Special Referee's order dated 21 August, 1922, and the other papers attached to the certificate; and counsel for the Trustee in Bank-[fol. 17] ruptcy and the petitioner, James C. Davis, Federal Agent, have been heard.

The sole question is whether the claims preferred by the petitioner, James C. Davis, Federal Agent, are entitled to priority over all other claims under the provisions of Section 3466 of the Revised Statutes. In the opinion of the Court the provisions of Section 3466 do not

apply to the claims of the petitioner. That Statute contemplated debts to the United States accruing to it directly under any satutory or contractual directions. The present claims do not fall into those categories. They are claims arising only incidentally to the temporary operation by the Government of the plant of a transportation corporation, operated by the Government in like manner as it would have been operated by the corporation itself had the Government not taken possession. The very description of the claims shows this. They are all for freight, storage and demurrage charges on merchandise transported as shipped by private parties.

The Government in possession of the Railway plant of a corporation undertook the commercial transportation of articles shipped by private persons in like manner as the same were transported by the corporation when in possession of the Railway plant and lines. For all these charges the Government Agent had a lien upon the articles transported. It was the duty of the Agent to have collected all their charges before delivering the articles to the consignees. Having seen fit to waive that lien and deliver the articles to the consignee without collecting the charges for which he had a lien the Agent of the Government under the circumstances of this case is not entitled to a prior lien upon the general estate of the bankrupt consignee.

It is therefore

Adjudged that the order of the Special Referee, Lionel K. Legge, Esq., made and dated 21st August, 1922, be, and the same is hereby approved and confirmed.

Henry A. M. Smith, United States Judge.

Charleston, S. C., January 15, 1924.

[fol. 18] IN UNITED STATES DISTRICT COURT

Proof of Unsecured Debt

In the Matter of Charles F. Boyd & Company, Bankrupt

At Charleston, in the Eastern District of South Carolina, on the 8th day of September, A. D. 1920, came John Barton Payne, Federal Agent U. S. Railroad Admrn. Atlantic Coast Line Railroad Company, by P. Nichols, of Charleston, Freight Agent, in the County of Charleston, in said District and made oath, and says that Charles F. Boyd & Company the person by (or against) whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is justly and truly indebted to John Barton Payne, Federal Agent United States Railroad Administration (Atlantic Coast Line Railroad) in the sum of Eighteen hundred and eighty-three & 87/100 Dollars; that the consideration of said debt is as follows:

United States Railroad Administration, Director General of Railroads.

Atlantic Coast Line Railroad

Statement of Demurrage Due by Chas. F. Boyd Company, to June 10, 1918

Cars	Bill Nos.	Date	Amount	Tax
IC-61931	2052	4/19/18	6.00	.18
NYC-25724	2171	5/9/19	3.00	.09
GT-8714	2235	6/22/18	70.00	2.10
MP-5547	2236	"	330.00	9.90
IC-142591	2243	5/24/18	120.00	3.60
B-4-46468	2244	5/24/18	120.00	3.60
Ga-8039	2245	5/24/18	50.00	1.50
UP-44332	2246	5/24/18	30.00	.90
NYC-47309	2284	5/28/18	160.00	4.80
PRR-63353	2346	6/8/18	150.00	4.50
THB-3735	2347	6/8/18	270.00	8.10
DL&W-35051	2353	6/10/18	240.00	7.20
SAL-23663	2354	6/10/18	280.00	8.40
			$1,829.00	54.87

Subscribed and sworn to before me this 8 day of September, 1920.

GEOFFREY N. MANN,
Notary Public for S. C.

In United States District Court

Proof of Unsecured Debt

In the matter of Charles F. Boyd & Co., Bankrupt.

At Charleston in the Eastern District of South Carolina on the eighth day of September, A. D. 1920, came P. Nichols (Freight Agent) of Charleston, in the County of Charleston, in said District of South Carolina and made oath, and says that Charles F. Boyd & Company the person by (or against) whom a petition for adjudica- [fol. 20] tion in bankrutcy has been filed, was at and before the filing of said petition, and still is justly and truly indebted to John Barton Payne, Federal Agent, U. S. Railroad Administration (Atlantic Coast Line Railroad Co.) in the sum of Three hundred and twenty-three and 83/100 Dollars; that the consideration of said debt is as follows:

John Barton Payne, Federal Agent, United States Railroad Administration

Atlantic Coast Line Railroad Office of Auditor of Freight Receipts

Statement of Undercharge.

On Shipment of Baled Hay Car N. Y. C. & St. L. 2181517 described below.

Consignor J. H. Colgrove Co., Inc. Point of Origin Canistoe, N. Y.

Consignee C. F. Boyd Co., Inc. Final Destination Charleston, S. C.

Way-Bill from Canistoe, N. Y. To Charleston, S. C. No. E-43—Date 4-4-18.

Articles	Weight in pounds	Class or special	Rate in cents per 100 lbs. or ton 2,000 lbs.	Total prepaid	Total collect	Total
....	....	....	.....	....	....	....

Freight Charges as Settled

Shipment refused and sold for	$306.17

Freight Charges as Should Be

Hay 25783 @ 30 per cwt.	77.35
War tax	2.32
Dem-4-25-18 to 4-29-18 inc. @ 3.00 per day	12.00
" 4-30-18 to 5- 2-18 " " 6.00 " "	18.00
" 5- 3-18 to 5-31-18 " " 10.00 " "	240.00
" 6- 1-18 to 7- 2-18 " " 10.00 " "	260.00
Storage 8-24-18 to 8-27-18 inc. @ 1c. per cwt.	16.01
War tax on Dem. & Storage	16.01
	636.00
Undercharge	329.83

Authority for Class—Authority for Rate Penna. So. Icc. 5461. Dem. I. C. C. B. 263 Item 60.

Storage I. C. C. 263 140.

Remarks: Consignees notified 4-20-18 due time 22nd and 24th, May 5th, 12th, 19th, and 26th. Sundays 10th holiday June 2, 9, 16th, 23rd, 30th. Sundays 3rd holiday.

[fol. 21] that no part of said debt has been paid; that there are no set-offs or counterclaims to the same and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever.

No note has been received for said account nor any judgment recovered thereon other than stated herein.

Deponent makes this proof because Atlantic Coast Line Railroad Co. the creditor is a Corporation and deponent is Freight Agent thereof.

P. Nichols (Freight Agent), Creditor.

Subscribed and sworn to before me, this 8 day of September, 1920. Geoffrey N. Mann, Notary Public for S. C. (Seal.)

IN UNITED STATES DISTRICT COURT

NOTICE OF APPOINTMENT OF JAMES C. DAVIS—Filed February 9, 1922

In re Charles F. Boyd & Company, Bankrupts, Notice.

Ex Parte James C. Davis, Agent.

To Lionel K. Legge, Esq., Special Referee, and Messrs. Mitchell & Horlbeck, Attorneys for the Trustee:

You will please take notice that James C. Davis, named in the caption has been appointed by the President Agent for the collection of claims due the Federal Administration in place of John Barton Payne, Director General and Agent, and that all proceedings in the [fol. 22] matter above stated shall be hereafter conducted in the name of the said James C. Davis, Agent.

You will also take further notice that the claims heretofore filed in this proceeding in the name of the said John Barton Payne, Director General, are in effect and under the law claims in favor of the United States of America, the same having accrued during the Federal Administration under the Proclamation of the President and the Acts of Congress relating to the control and operation of the railroads, and therefore that said claims are entitled to a priority over all other claims proved against the bankrupt estate.

Rutledge, Hyde & Mann, Attorneys for James C. Davis, Claimant.

IN UNITED STATES DISTRICT COURT

ORDER RE RECORD ON APPEAL—Filed March 18, 1924

By consent of counsel in this matter,

It is ordered, that the record on appeal to the Circuit Court of Appeals from the order of this Court dated January 15th, 1924, shall consist of the following papers:

1. A. C. L. Proof of unsecured debt for $1,883.87 filed 23rd of February, 1921.

2. A. C. L. Proof of unsecured debt for $329.18 filed 23rd February, 1921.

3. Notice of Rutledge, Hyde & Mann, Attorneys for Claimant, served 9th February, 1922, and filed 9th February, 1922.

4. Proof of claim of Atlantic Coast Line Railroad Company.

5. Petition of James C. Davis, Federal Agent as to claim for freight in the operation of Atlantic Coast Line Railroad Company.

[fol. 23] 6. Order of Lionel K. Legge, Special Referee, 21st of August, 1922.

7. Petition for review, 6th September, 1922.

8. Decree and order of Judge H. A. M. Smith, thereon.

9. Petition for review and assignment or errors and order allowing appeal.

It is further ordered, That no bond be required of the appellant in connection with this appeal.

It is furthr ordered, That the time within which the præcipe may be filed shall be and the same is hereby extended through the day of the date of this order and that this consent order shall constitute and stand as such præcipe.

Henry A. M. Smith, U. S. Judge.

18 March, 1924.

We consent,

Rutledge, Hyde & Mann, Attorneys for James C. Davis, Federal Agent, Appellant. Mitchell & Horlbeck, Attorneys for Ernest H. Pringle, Trustee, Respondent.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS

Now comes James C. Davis, Federal Agent for claims due in operation of Atlantic Coast Line Railroad Company and files this his assignment of errors as to the order of this Court made and filed in this matter on January 15th, 1924, complaining as follows:

1. Because his Honor the District Judge erred in holding that the provisions of Sections 3466 and 3467 of the revised statutes do not apply to the claim in question.

[fol. 24] 2. Because his Honor the District Judge erred in holding that the claim of the petitioner for freight, storage and demurrage is not a claim of the United States and entitled to priority under the provisions of Sections 3466 and 3467 of the revised statutes.

3. Because his Honor the District Judge erred in holding that the claim of the petitioner for freight, storage and demurrage is not a

eferred claim and entitled to priority under the provisions of the nkrupt Act.

4. Because his Honor the District Judge erred in finding that the vernment agent the petitioner, waived the lien which he had on the ods in question for the carriage and storage of the same.

James C. Davis, Federal Agent for claims due in operation of Atlantic Coast Line Railroad Company, by Rutledge, Hyde, Mann, Attorneys for Petitioner.

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO FILE RECORD

It appearing that the record on appeal in the above case will ot be completed in time for filing with the Clerk of the Court of Ap- eals as required by the Rule, it is:

Ordered, That the time for filing the record be extended thirty ays from this date.

Ernest F. Cochran, United States Judge.

February 25, 1924.

IN UNITED STATES DISTRICT COURT

RDER EXTENDING TIME TO FILE RECORD—Filed March 24, 1924

It appearing that the record on Appeal in the above case will not e completed in time for filing with the Clerk of the Circuit Court fol. 25] of Appeals on 25th instant, it is: Ordered, That the time or filing the record be extended twenty days from this date.

Henry A. M. Smith, United States Judge.

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO FILE RECORD—Filed April 12, 1924

It appearing that the record on Appeal in the above case will not be completed in time for filing with the Clerk of the Circuit Court of Appeals on 13th instant, it is: Ordered, That the time for filing the record be extended ten days from this date.

Henry A. M. Smith, United States Judge.

Charleston, S. C., March 24, 1924.

IN UNITED STATES DISTRICT COURT

STIPULATION RE TRANSCRIPT OF RECORD—Filed March 22, 1924

It is hereby stipulated and agreed that the Clerk of this Court shall make up a transcript of the record in the above styled cause, and transmit the same to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Va., and that it be printed under the supervision of the Clerk of that Court in accordance with Rule 23.

Rutledge, Hyde, Mann & Figg, Counsel for Appellant;
Mitchell & Horlbeck, Counsel for Appellee.

[fol. 26] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, Richard W. Hutson, Clerk of the District Court of the United States for the Eastern District of South Carolina, do hereby certify, that the foregoing is as true and correct copy of the record and proceedings in the case of Charles F. Boyd Company, Inc., Bankrupt, Ex Parte James C. Davis, Federal Agent for claims due in operation of Atlantic Coast Line Railroad Company, as appears by the original record now on file in my office and as directed by order in lieu of præcipe.

Given under my hand and the seal of said Court at Charleston. S. C., in the District aforesaid, this 14th day of April, A. D. 1924.

Rchd. W. Hutson, C. D. C. U. S. E. D. S. C. (Seal.)

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 2245

AMES C. DAVIS, FEDERAL AGENT FOR CLAIMS DUE IN OPERATION OF Atlantic Coast Line Railroad Company, Appellant

versus

. H. PRINGLE, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF Charles F. Boyd Company, Inc., Bankrupt, Appellee

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PPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, AT CHARLESTON

April 19, 1924, the transcript of record is filed and the cause locketed.

Same day, the original petition for appeal, order allowing appeal, nd citation are certified up under Sec. 7 of Rule 14.

Same day, the appearance of Benjamin H. Rutledge, Simeon Hyde, and Alex Koplin is entered for the appellant.

May 1, 1924, the appearance of Nath. B. Barnwell and
28 F. H. Horlbeck is entered for the appellee.

May 2, 1924, twenty-five copies of the printed record are iled.

Argument of cause

June 12, 1924 (June Term, 1924), cause came on to be heard, ogether with No. 2246, before Woods and Waddill, Circuit Judges, nd Webb, District Judge, and is argued by counsel and submitted.

29 *Opinion*

Filed September 29, 1924

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 2245

JAMES C. DAVIS, FEDERAL AGENT FOR CLAIMS DUE IN OPERATION OF Atlantic Coast Line Railroad Company, appellant

versus

E. H. PRINGLE AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF Charles F. Boyd Company, Inc., bankrupt, appellee

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, AT CHARLESTON. IN BANKRUPTCY

(Argued June 12, 1924. Decided Sept. 29, 1924)

Before WOODS and WADDILL, Circuit Judges, and WEBB, District Judge.

Alex Koplin, General Attorney for U. S. Railroad Administration (Simeon Hyde; Lambert McAllister and Rutledge, Hyde, Mann & Figg on brief), for appellant, and N. B. Barnwell (F. H. Horlbeck; Whaley, Barnwell & Grimball, and Mitchell & Horlbeck on brief) for appellee.

30 WOODS, Circuit Judge:

Charles F. Boyd Company, Inc., was adjudged bankrupt on August 20, 1920. The Director General on February 3, 1921, filed claims amounting to $2,213.70 for freight, storage, and demurrage accruing to the Atlantic Coast Line Railroad Company during Federal control. Afterwards on February 27, 1922, the Director General by petition claimed priority over general creditors in the distribution of the assets. No point seems to have been made before the Referee or the District Court that the claim for priority was not properly set up.

If demurrage, freight, and storage charges in favor of the Director General are debts due to the United States, and as such are entitled to priority, the priority was inherent in the debts and required recognition by the court when called to its attention at any time before distribution of the assets.

The Referee reported against the claim of priority and the District Judge confirmed his report.

We are unable to agree with the Referee and the District Judge
t the debts due to the Director General were not debts due to
United States of the character given priority by section 3466
the Revised Statutes. The Supreme Court has decided other-
e. In *Du Pont* vs. *Davis*, April 7, 1924, the court says: "In tak-
over and operating the railroad systems of the country the
ited States did so in its sovereign capacity, as a war measure,
nder a right in the nature of eminent domain.' *North Carolina R.*
Co. vs. *Lee*, 260 U. S. 16; *Missouri Pacific R. R. Co.* vs. *Ault*, 256
S. 554; *Northern Pacific R. R. Co.* vs. *North Dakota*, 250 U. S. 135;
re Tidewater Coal Exchange, 280 Fed. 648, 649; and it may not
held to have waived any sovereign right or privilege unless
inly so provided. Moneys and other property derived from the
operation of the carriers during Federal control, as we have
seen, are the property of the United States, Sec. 12, 40 Stat.
457. An action by the Director General to recover upon a
bility arising out of such control is an action on behalf of the
ited States in its governmental capacity. *Ches. & Del. Canal Co.*
United States, 250 U. S. 123; *In re Tidewater Coal Exchange*,
) Fed. 648." *Davis* vs. *Corona Coal Co.*, decided by the Supreme
urt May 26, 1924.

The question of priority of debts, other than taxes, owing to the
ited States in the distribution of bankrupt estates is one of
ficulty. It is not to be decided on the general doctrine of priority
debts due the sovereign, for the Congress has undertaken to cover
whole subject by statutes. The act of 1797, R. S. 3466, pro-
les:

'Whenever any person indebted to the United States is insolvent,
whenever the estate of any deceased debtor, in the hands of the
ecutors or administrators, is insufficient to pay all the debts due
om the deceased, the debts due to the United States shall be first
isfied; and the priority hereby established shall extend as well
cases in which a debtor, not having sufficient property to pay
his debts, makes a voluntary assignment thereof, or in which
estate and effects of an absconding, concealed, or absent debtor
attached by process of law, as to cases in which an act of bank-
ptcy is committed."

virtue of this statute the United States had a preference in the
yment of its debts under any of the conditions mentioned in the
tute—but not in a distribution which for any reason did not
ne within the statute. *United States* vs. *Oklahoma*, 261 U. S. 253.
that case the State, setting up a claim in behalf of the depositors
a bank under authority of a State statute, was held to have
iority over debts due the United States, on the express ground
at the bank assets in the hands of a State commission did not
esent a condition under which the statute gave the United States
iority.

32 The Bankruptcy Statute of 1867, R. S. 5101, provided the following order of priorities:

"In the order for a dividend the following shall be entitled to priority and to be first paid in full in the following order:

First: The fees, costs, and expenses of suits, and of the several proceedings in bankruptcy under this title, and for the custody of property, as herein provided.

Second: All debts due to the United States, and all taxes and assessments under the laws thereof.

Third: All debts due to the State in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws thereof.

Fourth: Wages due to any operative, clerk, or house-servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy.

Fifth: All debts due to any person, who, by the laws of the United States, are, or may be, entitled to a priority, in like manner as if the provisions of this title had not been adopted. But nothing contained in this title shall interfere with the assessment and collection of taxes by the authority of the United States or any State."

Thus not only taxes but all debts due the United States were given priority over all other liabilities, except costs and expenses of bankruptcy proceedings. In other words, the priority given all debts due to the United States by R. S. 3466 was sanctioned and reenacted by the Bankruptcy Statute of 1867. As the court said in *Lewis, Trustee*, vs. *United States*, 92 U. S. 618, the statute contained no qualification of priority of the United States, and the court could not interpolate one.

33 What limitation, if any, in the distribution of bankrupt assets did the subsequent Bankruptcy Act of 1898 put upon the general priority given the United States under the previous statutes? The Act of 1898 was intended to cover completely all matters of adjudication, administration, discharge, priorities, and distribution of assess. The Statute and rules made under it supplanted and annulled all previous inconsistent statutes and rules of the courts of common law and equity. *United States Fidelity & Guaranty Company* vs. *Bray*, 225 U. S. 205, 217. "The Act takes into consideration, we think, the whole range of indebtedness of the bankrupt, national, state, and individual, and assigns the order of Payment." *Guarantee Company* vs. *Title Guaranty Company*, 224 U. S. 152, 160.

The Statute provides the following order of priority:

(a) The court shall order the trustee to pay all taxes legally due to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors.

(b) Debts to have priority, except as herein provided, and to be paid in full, * * * and the order of payment shall be: (4)

ages due to workmen, clerks, traveling or city salesmen, or servants, hich have been earned within three months before the date of the ommencement of the proceedings; and (5) debts owing to any erson who by the laws of the States or the United States is entitled priority.

The Congress thus took from debts due the United States, other an taxes, the priority given such debts along with taxes by the ct of 1867 by leaving out of the Act of 1898 other debts in providing for priority of taxes. This seems too clear for discussion; and

4 so the court decided in *Guaranty Company* vs. *Title Guaranty Company*, supra. There it was held that the Act of 1797, . S. 3466, the Bankruptcy Statute of 1867, R. S. 5101, and the ankruptcy Statute of 1898 must be considered in pari materia; nd that in bankruptcy proceedings the Act of 1898 superseded sec- ion 3466, R. S., so far as the two statutes were inconsistent.

It is argued, however, that priority is given the United States ext in order to debts for wages, by Sec. 64-b (5) "Debts owing to ny person who by the laws of the States or the United States is ntitled to priority." This grade of priority is not given to the nited States by virtue of R. S. 3466 unless the United States falls nder the designation of "any person." The Statute itself gives his definition: "(19) 'persons' shall include corporations except here otherwise specified, and officers, partnerships, and women, and hen used with reference to the commission of acts which are herein orbidden shall include persons who are participants in the for- idden acts, and the agents, officers, and members of the board of irectors or trustees, or other similar controlling bodies of corpora- ions." Sec. 1, cl. (19), Bankruptcy Act of 1898.

The failure to include the United States and the States in the efinition could not have been inadvertent. The United States and he several States of the Union are not persons and are not commonly hought of as persons, and if it had been intended that "persons" hould have such a comprehensive and unusual meaning as to include hem, the framers of the definition would have said so.

Again, when the Congress had already dealt with claims of the nited States under the name of the United States and had delib- rately limited its priority to taxes, it is hardly reasonable to ttribute to the Congress an intention to deal again with the claims f the United States and include them in a provision relating to debts of "any person."

5 It will be noticed further that the language of (5) Section 64–b of the act of 1898 is taken almost literally from the cor- esponding sub-division of the Bankruptcy Act of 1867, and in the bsence of the expression of a contrary intention the language hould be held to have the same meaning in the latter statute as in he former from which it was taken. In the Act of 1867 "persons" n sub-division (5), R. S. 5101, could not have been intended to nclude the United States because all the debts due to the United

States had been provided for and given priority over all other debts of any kind by sub-division (2) of the same section.

The record of the passage of the Bankruptcy Act of 1898 is significant. The bill as passed by the Senate contained the following priorities:

"SEC. 9. That the following debts shall have preference in the order named, over other debts in the distribution of the estate of the bankrupt, to wit:

"First: Debts due to servants or laborers employed by the bankrupt. * * *

"Second: Taxes or revenues due the United States.

"Third: Taxes due any State or Territory or the District of Columbia.

"Fourth: Taxes due any county, * * *"

"But none of such debts shall be recognized or paid unless duly proved and allowed as prescribed in reference to other debts and claims against the bankrupt."

All that followed the enacting clause of the Senate bill was struck out by the Committee of the House, and the House bill with about eighty amendments was substituted. The original House bill as introduced and referred to the Committee contained the following as to priorities:

36 "Sec. 64. Debts which have priority: (a) Debts owing to the United States, a State, a county, a parish, or a municipality, after being proved and allowed, shall have priority only in the event and to the extent that they constitute a lien upon the property of the estate." The committee changed this section to the form in which it was enacted in the act of 1898.

Thus it appears that after consideration of the question the Congress struck out a provision for priorities of all lien debts owing to the United States, the States and municipalities, and substituted for it a provision in the act of 1898 limiting the priority of the United States, the States and municipalities to taxes.

As it seems to us, the analysis of the statutes and the record of the passage of the act of 1898 require the holding that the law making power of the United States has limited its priority in bankruptcy to its claim for taxes.

This conclusion is opposed to the high authority of the Circuit Court of Appeals of the Second Circuit: *In re Tidewater Coal Exchange*, 280 Fed. 648, 650; and of the Eighth Circuit: *In re Western Implement Company*, 171 Fed. 81. In the view of these courts the United States and States are persons within the meaning of subdivision (5) of Section 64–b of the Bankruptcy Act of 1898, and, therefore, entitled to priority under R. S. 3466 over general creditors after payment of wages. In the Tidewater case the court cited as authority for the holding *In re Hibner Oil Company*, 264 Fed. 667. But the Circuit Court of Appeals of the Seventh Circuit in the latter case was called on to discuss and decide only the question whether a debt due to the Director General was a debt due to the

nited States: the court did not discuss the priority of a debt due the United States, for in the opinion it is stated the priority of ch a debt was conceded. Judge Rose in the District Court of Maryland expressed assent to these authorities *In re Atlantic, G. & P. S. S. Company*, 289 Fed. 146, but as the court held there was no debt to the United States the point was not ally involved. The State of Minnesota was held to be "a per-n" within the meaning of Section 64–b of the Bankruptcy Act 1898 by Judge Purdy in the District Court for that State, *In re Western Implement Company*, 166 Fed. 578; and the judgment was firmed by the Circuit Court of Appeals of the Eighth Circuit r the reasons stated by the District Judge, 171 Fed. 81. *The nited States* vs. ***National Surety Company***, 254 U. S. 73, does not cide the question. There the priority of debts due the United tates over general creditors seems to have been conceded by the rties, for the court is careful to say that the sole question pre-nted was whether in the distribution of a bankrupt estate the nited States has priority over a surety company claiming subroga-on to the rights of the United States. *Marshall, Receiver*, vs. *he People*, 254 U. S. 380; *United States* vs. *Oklahoma*, 261 U. S. 3; *Davis, Director General*, vs. *Pullen*, (First Circuit), 277 Fed. 0, and *Davis, Director General*, vs. *Miller-Link Lumber Company*, Fifth Circuit), 296 Fed. 649, are not authorities for either side, r the question of the right to priority arose in receivership pro-edings, and, therefore, did not involve the meaning of the pro-sions of Section 64 of the Bankruptcy Act of 1898 fixing priority. We find no binding authority opposed to the conclusion that the nited States has no priority in bankruptcy except for taxes. On e contrary we venture to think it is supported by the reasoning d conclusion of the court in *Guarantee Company* vs. *Title Guar-nty Company*, 224 U. S. 152. In *Sloan Shipyards* vs. *United States leet Corporation*, 258 U. S. 549, the majority of the court denied riority in a bankruptcy proceeding set up by the Emergency Fl et orporation on the ground that even if the United States would be entitled to priority, the Emergency Fleet Corporation was a separate entity and its claim for priority could not be sus-tained. The majority intimated no opinion on the question hether a debt to the United States other than for taxes would have en entitled to priority. The Chief Justice and Justices Van De-nter and Clark dissented from the reasoning of the majority, b t s to the claim to priority concurred in the result in this language ed by the Chief Justice: "As to the preference claimed against a nkrupt in No. 526 by the Fleet Corporation, I concur in the con-usion of the court that it cannot be allowed under the statute as preferences in bankruptcy, because I do not think it extends to laims of the United States except those for taxes."

For the reasons stated, and on the authority of *Guarantee Com-ny* vs. *Title Guaranty Company*, supra, and the views expressed by e Chief Justice and Justices Van Devanter and Clark above

quoted, we hold that in bankruptcy, debts due to the United States other than for taxes have no priority over general creditors.

No sound principle of public policy can be invoked in support of preference to the Federal Government and to the States over citizens in the collection of ordinary debts. On the contrary, the contractual operations of the Federal Government and of the States have become so extensive and so involved with the business of private citizens that priority to the Federal Government and to the States except for taxes would operative as an oppressive hardship on other creditors of bankrupts.

Affirmed.

39 *Decree*

Filed and entered September 29, 1924

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 2245

JAMES C. DAVIS, FEDERAL AGENT FOR CLAIMS DUE IN OPERATION OF Atlantic Coast Line Railroad Company, appellant

vs.

E. H. PRINGLE, AS TRUSTEE IN BANKRUPTCY, OF THE ESTATE OF CHARLES F. Boyd Company, Inc., Bankrupt, appellee

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of South Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged, and decree by this Court that the decree of the said District Court
40 in this cause, be, and the same is hereby, affirmed with costs.

C. A. WOODS,
U. S. Circuit Judge.

SEPTEMBER 29, 1924.

On another day, to wit, October 30, 1924, the mandate of this court in this cause is issued and transmitted to the U. S. District Court at Charleston, South Carolina, in due form.

Same day, the original petition for appeal and order allowing appeal are returned to the Clerk of the U. S. District Court at Charleston, South Carolina.

Clerk's certificate

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, CLAUDE M. DEAN, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the
41 Fourth Circuit, at Richmond, Virginia, this 5th day of November, A. D. 1924.

[SEAL.]

CLAUDE M. DEAN,
U. S. Circuit Court of Appeals,
Fourth Circuit.

○

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 787

JAMES C. DAVIS, FEDERAL AGENT FOR CLAIMS DUE IN OPERATION OF SEABOARD AIR LINE RAILWAY COMPANY, PETITIONER,

vs.

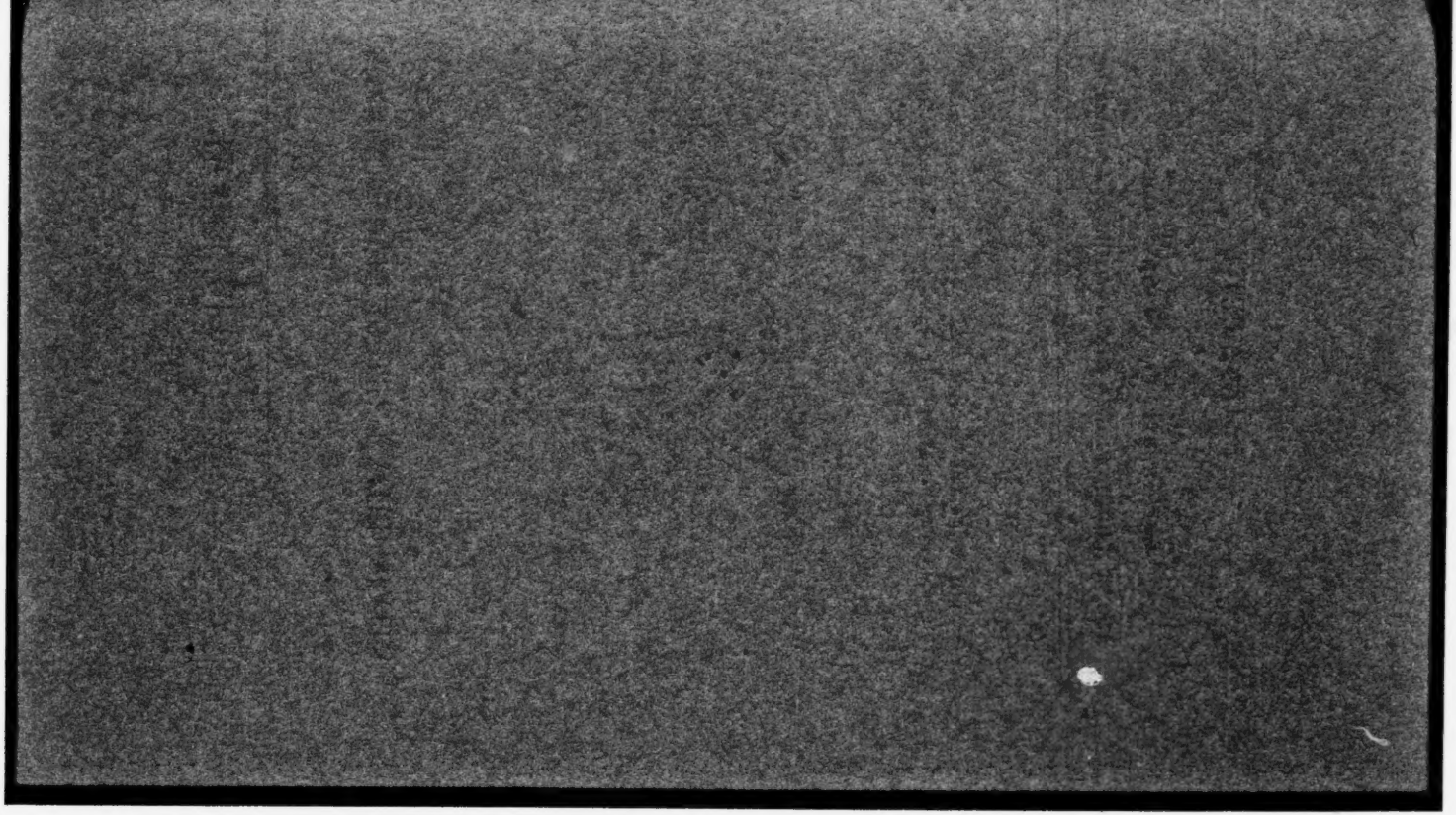
E. H. PRINGLE, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF CHARLES F. BOYD COMPANY, INC., BANKRUPT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 22, 1924

CERTIORARI GRANTED MARCH 2, 1925

(30,752)



(30,752)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 787

JAMES C. DAVIS, FEDERAL AGENT FOR CLAIMS DUE IN OPERATION OF SEABOARD AIR LINE RAILWAY COMPANY, PETITIONER,

vs.

E. H. PRINGLE, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF CHARLES F. BOYD COMPANY, INC., BANKRUPT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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[fol. 1] **IN UNITED STATES DISTRICT COURT**

CAPTION

THE UNITED STATES OF AMERICA,
Eastern District of South Carolina:

IN THE DISTRICT COURT, TO-WIT, IN BANKRUPTCY

At a District Court of the United States for the Eastern District of South Carolina, begun and held at the Court House in the City of Columbia, S. C., on the third Tuesday of January, being the fifteenth day of the same month in the year of our Lord, one thousand nine hundred and twenty-four.

Present: The Honorable Ernest F. Cochran, United States District Judge for the Eastern District of South Carolina, presiding at Columbia, S. C., and the Honorable Henry A. M. Smith, United States Judge, presiding at Charleston, S. C.

Among other were the following proceedings, to-wit:

In the Matter of CHARLES F. BOYD COMPANY, INC., Bankrupt

Ex Parte JAMES C. DAVIS, Federal Agent, for Claims Due in Operation of Seaboard Air Line Railway Company

IN UNITED STATES DISTRICT COURT

PROOF OF DEBT DUE CORPORATION—Filed Sept. 28, 1920

At Portsmouth, Virginia, in the Eastern District of Virginia on the 23rd day of September, A. D. 1920 came T. W. Mathews, of Portsmouth, in the County of Norfolk and State of Virginia and [fol. 2] made oath, and says that he is Assistant Treasurer of Seaboard Air Line Railway Company, a corporation incorporated by and under the laws of the State of South Carolina and carrying on business at Charleston, South Carolina, and that he is duly authorized to make this proof, and says that the said Charles F. Boyd & Company the person by (or against) whom a Petition for Adjudication of Bankruptcy has been filed, was at and before the filing of the said petition, and still is, justly and truly indebted to said corporation in the sum of Two Thousand Two Hundred and Seven 43/100 Dollars; that the consideration of said Debt is as follows: Freight, Storage and demurrage on shipments of ground hulls from Willich & Company, New Orleans, La., to Charles F. Boyd & Company, that no part of said debt has been paid, that there are no set-offs or counter claims to the same and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security

for said debt whatever, and that no note has been received for said debt and no judgment rendered thereon.

T. W. Mathews, Asst. Treas. of said Corporation.

(Verified.)

LETTER OF BUIST & BUIST, DISTRICT COUNSEL, TO L. K. LEGGE, REFEREE, DATED FEBRUARY 6, 1922

DEAR SIR: During the course of the administration of the Boyd Bankrupt Estate we filed with you claims in behalf of the Director General of Railroads. The General Solicitor of the Railroad Administration has directed us to call to your attention section 3466 of the Revised Statutes of the United States, providing for a preference to claims due to the United States in bankruptcy proceedings.

In the case of in re Hibner 264 F. 667, it is decided that a claim [fol. 3] in behalf of the Director General comes within the purview of this Statute.

We respectfully request that the claim in question should be listed among those entitled to preference.

Yours very truly, Buist & Buist, District Counsel Seaboard Air Line Railway Company, Charleston, S. C.

IN UNITED STATES DISTRICT COURT

ORDER OF LIONEL K. LEGGE, SPECIAL REFEREE—Filed August 21, 1922

On August 20th, 1920, Charles F. Boyd Company, Inc., was adjudicated Bankrupt. On February 23rd, 1921, John Barton Payne, Federal Agent, filed in the cause two claims for freight, storage and demurrage earned by the Atlantic Coast Line Railroad, as follows:

(a) Claim for demurrage accruing on and between April 19, 1918, and June 10th, 1918—$1,883.87.

(b) Claim for freight, storage and demurrage accruing on and between April 29th, 1918 and August 27th, 1918—$329.83.

These claims were filed as unsecured claims in the usual form, duly itemized, and no claim for priority as to them was made at that time.

On September 28th, 1920, there was filed on behalf of the Seaboard Air Line Railway a proof of unsecured claim for "Freight, storage and demurrage on shipment of ground hulls from Willich & Co., New Orleans, La., to Charles F. Boyd & Co.," in the amount of $2,207.43. This claim was not itemized other than stated. On February 6th, 1922, counsel for the Seaboard Air Line Railway Company requested by letter that the claim last above referred to

be listed as entitled to priority under Section 3466 of the Revised [fol. 4] Statutes of the United States. Thereafter on February 9th, 1922, counsel for James C. Davis, Federal Agent, filed a notice of the appointment of James C. Davis as Federal Agent in the place of John Barton Payne, and also to the effect that the claims theretofore filed in the name of John Barton Payne, and first above referred to, were entitled to priority as debts due the United States.

After due notice a hearing was held before me on May 29th, 1922, at which time the attention of counsel representing the claim of Seaboard Air Line Railway Company was directed to the fact that the claim as filed made no mention of the date or dates of its accrual, and that there was, therefore, nothing in the record to show that this claim had accrued during the period of Federal control.

The hearing was thereupon adjourned in order that counsel might file such amended proofs of Claim and Petitions for priority as they might be advised.

Subsequently, on July 27th, 1922, there was filed on behalf of James C. Davis, Federal Agent, a Petition for priority as to the two claims first above referred to, as accruing during the period of Federal control of the lines of the Atlantic Coast Line Railroad Company. On August 2nd, 1922, I notified counsel for the Seaboard Air Line Railway Company that more than two months had elapsed since the adjournment of the hearing on May 29th, for the purpose of enabling them to file an amended Proof of Claim, and requested that their claim be gotten in such shape as to be properly before me for a decision on the merits. No amended Proof of Claim has been filed however, and, as the record now stands, there is nothing to show when this claim accrued.

The sole question presented before me is whether, under the provisions of the Revised Statutes, Section 3466, and the Bankrupt Act of 1898, these claims are entitled to priority. So far as concerns the claims for freight, storage and demurrage accruing on the lines of the Atlantic Coast Line Railroad, it is admitted that these claims accrued during the period of Federal control. As to the claim for freight, storage and demurrage on the lines of the Seaboard Air Line Railway Company, there is as I have already stated, [fol. 5] nothing before me to show when the alleged indebtedness arose, and the claim for priority might very properly be dismissed for that reason. Realizing, however, that under the principle "nullum tempus occurrit regi," this claim may eventually be so amended as to show that it accrued during the period of Federal control, I shall so regard it for the purposes of this decision, as the present cause has been pending now for nearly two years and should, in the interest of all concerned, be terminated without further delay.

Prior to the Bankrupt Act of 1898, there was no doubt but that all claims of the United States, whether for taxes or otherwise, were entitled to priority, in view of the provisions of the Revised Statutes, Section 3466, and because of the further fact that the Federal Government was not bound by the then existing Bankruptcy Law.

Lewis vs. United States, 92 U. S. 618; United States vs. Herron, 20 Wall. 51; Harrison vs. Storey, 5 Cranch. 289; United States vs. Dallas, 140 U. S. 632; Redfield vs. Parks, 132 U. S. 239.

By the Bankrupt Act of 1898, however, the United States must, except as to claims for taxes, be considered as having assumed the position of a general creditor only. (Guarantee Title & Trust Co., Trustee, vs. Title Guaranty & Surety Co., 224 U. S. 152).

The question in the case last cited was as to the priority of payment out of a bankrupt estate of a claim due the United States on a Bond, and a claim for wages due a laborer. The Court considered the Act of March 3rd, 1797, Revised Statutes Sec. 3466) in its relation to the Bankrupt Acts of 1867 and 1898, and reached the conclusion that, while the Bankrupt Act of 1867 and the Act of March 3, 1797, (Revised Statutes, Section 3466) by both of which debts due the United States were given priority over all other claims, were in pari materia, the latter Act affirming the former, yet the Bankrupt Act of 1898 with its change of provisions regarding priority, was not in affirmation of Revised Statutes, Section 3466, and indicated a change of purpose in that respect. The Court held accordingly that, in spite of the provisions of Revised Statutes Section 3466, claims of the United States other than for taxes, are [fol. 6] since the Bankrupt Act of 1898, not entitled to priority over labor claims. In considering the effect of the provisions of Section 64 of the Bankrupt Act of 1898, the Court said:

"It will be seen therefore that by the Statute of 1797 (now Section 3466) and Section 5101 of the Revised Statutes all debts due to the United States were expressly given priority to the wages due any operative, clerk or house servant. A different order is prescribed by the Act of 1898 and something more. Labor claims are given priority and it is provided that debts having priority shall be paid in full. The only exception is 'taxes legally due and owing by the Bankrupt to the United States, State, County, District or Municipality.' These were civil obligations, not personal conventions, and preference was given to them, but as to debts we may assume a change of purpose in the change of Act. And we cannot say that it was inadvertent. The Act takes into consideration, we think, the whole range of the indebtedness of the Bankrupt, National, State and individual, and assigns the order of payment. The policy which dictated it was beneficent, and well might induce a postponement of the claims even of the sovereign in favor of those who necessarily depend upon their daily labor. And to give such claims priority could in no case seriously affect the sovereign. To deny them priority would in all cases seriously affect the claimants."

So in the case of Lott vs. Salsbury, 237 Federal 191, the Circuit Court of Appeals for the Fourth Circuit, referring to the above decision says:

"The United States, except for taxes due, has not, in the enactment of the Bankruptcy Law, exercised its sovereign right of pro-

viding a preference, for its own claims against the Bankrupt * * *. The Government has, except as to taxes, put itself in the plight of an ordinary unsecured creditor."

See also In re: Jacobson, 263 Fed. 881.

It would seem therefore, that no reliance can be placed by the United States upon Revised Statutes, Section 3466, in support of its [fol. 7] claim to priority, but that its claim to priority must be sustained, if at all, by the provisions of the Bankruptcy Act of 1898.

It is contended on the part of the government that these claims are entitled to priority under Revised Statutes, Section 3466, by virtue of subdivision 5 of Section 64 (b) of the Bankrupt Act of 1898 which gives priority to "debts owing to any person who by the laws of the States of United States is entitled to priority." With this view I cannot concur. Revised Statutes, Section 3466, was enacted in 1797, amended in 1799, and has never since been changed. Is it to be broadened by implication to include debts incurred in purely commercial transactions in which the United States has abandoned its sovereign character?

In the recent case of Krichman vs. United States, 41 Sup. Ct. 514, the Defendant was indicted for offering a bribe to a Railroad porter employed on the Pennsylvania Railroad while it was under Federal control, the indictment being under Section 39 of the Criminal Code of the United States, making it an offense to offer a bribe to an officer of the United States, or to a person acting for or on behalf of the United States in an official function under or by the authority of a department or office of the government. The Supreme Court held that the indictment would not lie. In considering the Statute creating the offense, the Court said:

"The Statute creating the offense was passed long before there was any thought of the government taking over the railroads. That does not prevent its application if the thing done offends against it. It is, however, a circumstance proper to be considered in determining whether the situation is one intended to be dealt with by Congress."

In the present case the Statute relied upon to sustain the claim for priority was passed more than a century ago and has remained practically unmodified. The language quoted above applies with equal force in consideration of the question involved here.

An examination of the Proclamation and Acts of Congress relating to Federal control shows that, while the control by the govern- [fol. 8] ment was absolute, it extended only so far as to give "complete possession by governmental authority to replace, for the period of the war, the private ownership theretofore existing." (Northern Pacific Railway vs. North Dakota, 250 U. S. 135).

While all the earnings of the railroad were by the Act expressly made the property of the United States, this was only "for the purpose of enabling the United States to perform the obligations that it assumed and to secure it from ultimate loss." Ibid. In constru-

ing the Federal Control Act, the Supreme Court, in the case of Missouri Pacific Railroad vs. Ault, 256 U. S. 554, says:

"The plain purpose of the above provision was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President, except in so far as such rights and remedies might interfere with the needs of Federal operation * * *. The substantial legal rights of persons having dealings with the carriers were not to be affected."

It is clear that to give the United States priority in cases such as the present would interfere with the substantial legal rights of the public.

As a general proposition when the government enters into commercial business it is to be treated as any other private citizen.

United States vs. Planters Bank, 9 Wheat. 904; Salas vs. United States, 234 Fed. 842; Pope vs. United States Shipping Board, 269 Fed. 319; United States vs. Strang, 254 U. S. 494.

Under the construction of the Federal Control Act, in the cases of Northern Pacific Railway vs. North Dakota, and Missouri Pacific Railway vs. Ault, and United States vs. Strang above referred to, it is clear that it was never the intention of Congress, in taking over the railroads, to extend the power and prerogatives of the United States as a sovereign beyond that which was essential to prevent interference with their uninterrupted operation for war purposes. When we [fol. 9] consider the decisions with reference to the United States Shipping Board Emergency Fleet Corporation, this becomes all the more evident. It is true that the war powers of the United States with reference to ocean transportation were handled through a corporation in which all of the stock was owned by the United States, whereas with reference to land transportation they were handled through the Director General of Railroads. Each, however, in spite of differences as to legal status, was the agency adopted by the government for the conduct of certain necessary commercial enterprises under its war powers.

It would indeed be anomalous if it should be held that the government had priority as to debts for freight charges earned in land transportation, but had no such priority with reference to freight charges earned in ocean transportation. And yet, such would be the case if the contention of the government is sustained here.

In the case of United States Emergency Fleet Corporation vs. Wood, 42 Sup. Ct. 386, decided on May 1st, 1922, the Court holds point blank that, in spite of the exclusive ownership by the United States, the Fleet Corporation stood like other creditors and was not to be preferred. The language of the Chief Justice in an opinion concurred in by Justices Van Deventer and Clarke, which concurs with the main opinion of the Court in the result as to this question, is most significant on the particular point involved here. The opinion in this case really involves the decision of three separate cases against the Emergency Fleet Corporation. The main opinion

by Justice Holmes decided that suits against the Fleet Corporation were not suits against the United States. The concurring and dissenting opinion of the Chief Justice holds that suits against the Fleet Corporation should be regarded as suits against the United States. Nevertheless, and in spite of this view, the Chief Justice concurs in the majority opinion denying priority for claims of the Fleet Corporation in Bankruptcy, and, while he does not cite the case of Guarantee Title & Trust Co., Trustee, vs. Title Guarantee & Surety Co., above referred to, his reasons for reaching this conclusion coincide exactly with the reasoning of the Supreme Court in that case, Says the Chief Justice:

"As to the preference claimed against a bankrupt estate in No. [fol. 10] 526 by the Fleet Corporation, I concur in the conclusion of the Court that it cannot be allowed under the Statute as to preferences in Bankruptcy, because I do not think that it extends to claims of the United States except those for taxes."

The government relies upon two decisions of the Circuit Court of Appeals as conclusive of its claim: In re Hibner Oil Company, 264 Fed. 667; Davis vs. Pullen, 277 Fed. 650.

At first glance both of these cases would seem to be conclusive of the question involved. Upon closer examination, however, in the light of the cases above referred to, neither the Hibner case nor the Pullen case can be considered as controlling authority on the point involved here.

In the Hibner case the only question considered by the Court was whether a claim for freight charges constituted a debt due the United States. No question appears to have been made in that case as to the right of the United States to priority, nor was the decision of the Supreme Court concerning the effect of the Bankrupt Act of 1898 on the right of the government to priority as to claims other than taxes (Guarantee Title & Trust Co., Trustee vs. Title Guarantee & Surety Co., supra) even considered. The Court said:

"If the claim is 'property' and constituted a debt due to the United States then concededly its priority was properly found * * *. The claim for freight charges is 'property' derived from the operation of the carrier during Federal control and is thus 'property' of and therefore a debt due to the United States. As such it was entitled to the priority as found."

There is of course no doubt but that the freight claimed is a debt due the United States (Northern Pacific Railway vs. North Dakota—250 U. S., 135; Missouri Pacific Railway vs. Ault—256 U. S. 554.) It by no means follows, however, that it is "as such" entitled to priority. On the contrary, the decisions referred to above show clearly that it is not.

[fol. 11] In the case of Davis vs. Pullen, a creditors' bill had been filed and a Receiver appointed for a corporation thought to be temporarily embarrassed, but which turned out to be insolvent. The Director General filed a claim with the Receiver for freight charges

accruing during the period of Federal control, and contended that this claim was entitled to priority under Revised Statutes, Section 3466, as debts due the United States. The main question involved was whether the appointment of a Receiver constituted an act which would bring into operation the provisions of Section 3466 of the Revised Statutes relative to debts due the United States. Both the Master and the District Court held that the case was not a bankruptcy or insolvency proceeding within the meaning of Section 3466. The holding of the lower Court was reversed.

The Court further considered the questions:

(a) Whether the freight claims were debts due the United States.

(b) Whether, if debts due the United States, they were entitled to priority.

Basing its decision on the Hibner case and on the Supreme Court decisions in Northern Pacific Railway vs. North Dakota, supra, and Missouri Pacific Railway vs. Ault, supra, the Court held the claims to be debts due the United States.

On the question of priority, the Court decided in favor of the contention of the government, basing its decision on the following cases: United States vs. National Surety Co., 254 U. S., 73; Marshall vs. New York, 254 U. S., 380; Lewis vs. United States, 92 U. S. 618; United States vs. Barnes, 31 Fed. 705; United States vs. State Bank of North Carolina, 6 Pet. 29; New Jersey vs. Anderson, 203 U. S. 483; Richmond vs. Bird, 249 U. S., 174; Pennsylvania Cement Co. vs. Bradley Contracting Co., 274 Fed. 1003; In re: Hibner Oil Co., 264 Fed. 667.

Under these decisions it says:

[fol. 12] "In the light of these authorities we must hold the Statute (i. e. Revised Statutes, Section 3466) applicable to all debts due the United States."

It is significant that the Court, in reference to the contention of the Receiver that, even if the freight claims were debts due the United States, nevertheless such claims were not entitled to priority within the meaning of the Statute used the following language:

"There is a certain obvious injustice in giving the United States, when engaged in an industrial and commercial venture, even although under war powers, superior rights over other creditors bearing like relations to insolvents."

It is a remarkable fact that the Court entirely overlooked the Supreme Court decision in the case of Guarantee Title & Trust Co., Trustee vs. Title Guarantee & Surety Co., 224 U. S. 152, and the decision of the Circuit Court of Appeals for the Fourth Circuit in the case of Lott vs. Salsbury, 237 Fed. 191, referred to above. The only apparent reason for so obvious an omission is that the Pullen case was not a proceeding in Bankruptcy, and that the Bankrupt Law, therefore did not apply. If this was the reason for the omis-

sion, the logical conclusion would be that the Pullen case is not to be taken as authority in construing Section 3466 as applied to proceedings in Bankruptcy. In other words, even if Section 3466 applies to all debts due the United States, that Section is not to be given this extended construction when the question arises in a bankruptcy proceeding where the controlling authority with reference to debts due the United States is no longer Section 3466 of the Revised Statutes but the Bankrupt Act of 1898.

Apart from that view, however, it seems to me that the decisions relied upon in the Pullen case do not sustain the conclusion there reached that Section 3466 is applicable to "all debts due the United States," so as to include a claim for freight charges earned in the operation of the Railroads by the government under its war powers and in pursuance of the Federal Control Act and the Proclamations issued by the President.

The case of the United States vs. National Surety Co., 254 U. S. [fol. 13] 73, arose out of Bonds given to secure contracts entered into by a contractor with the United States. The contractor defaulted, and the United States, having lost thereby Thirteen Thousand Dollars ($13,000.00), the Surety Company paid to the government on account of this loss Three Thousand One Hundred Fifty Dollars ($3,150.00). Both the United States and the Surety Company proved their claims in the Bankruptcy proceedings, the government claiming priority over all creditors under Revised Statutes, Section 3466, and the Surety Company claiming a like priority by subrogation under Revised Statutes, Section 3468, providing that, when a surety pays to the United States money due upon a bond, such Surety is subrogated to the claims of the United States. The Court held that the United States was entitled to priority for its whole debt as against the Surety Company.

It is true that language is used in the opinion of the Court which, considered alone, gives to Revised Statutes, Section 3466, the same broad scope that it had prior to the Bankrupt Act of 1898. Taken together with the decision of the Supreme Court in the case of Guarantee Title & Trust Company, Trustee, vs. Title Guarantee & Surety Company, supra, however, this language must be construed in the light of the fact that the only question being considered by the Court was the relative meaning of Section 3466 and Section 3468 without reference to the effect of the Bankrupt Act of 1898 on the scope of these Sections, and certainly throws no light on the question in issue here.

The case of Marshall vs. New York, 254 U. S., 380, was a suit in equity against a corporation, in which the State of New York claimed priority as to certain franchise taxes and license fees. The sole question involved in the case was as to the prerogative right of the State as a sovereign to claim priority over all its subjects in the payment of debts due it. The only debts involved in the case were taxes, and the decision is based on the sovereign common law right of the State, independent of all Statutes.

The case of Lewis, Trustee vs. United States, 92 U. S. 618, involved the question of priority as to claims of the United States

against the individual members and the firm of Jay Cook & Com-
[fol. 14] pany, Bankrupt, for moneys which the United States had placed in the hands of the firm for disbursement. The fundamental decision in this case was that the then existing Bankruptcy Act (i. e. Bankrupt Act of 1867) in no wise bound the United States, so that Section 3466 of the Revised Statutes was without qualification. Since the Bankrupt Act of 1898, however, Section 3466 of the Revised Statutes is qualified and controlled by the latter Act, as has already been noted in the discussion of the case of Guarantee Title & Trust Co., Trustee, vs. Title Guarantee & Surety Co., supra, in which decision the Lewis case was fully discussed. Since the case of Guarantee Title & Trust Co., Trustee, vs. Title Guarantee & Surety Co., therefore, the Lewis case can no longer be regarded as controlling authority even as to the construction of Section 3466 of the Revised Statutes.

The decision in the United States vs. Barnes, 31 Federal 705, related to the priority of a judgment under the Customs Revenue Laws against the Bankrupt and is based directly on the case of Lewis vs. United States, supra.

In the case of United States vs. State Bank of North Carolina 6 Pet. 29, the question involved was whether, under the Revised Statutes, Section 3466, the priority given to the United States applied to a Bond which did not become due until after the General Assignment for the Benefit of Creditors. The Court held that it did apply. There was no question in this case under any Bankrupt Act.

In the case of New Jersey vs. Anderson, 203 U. S. 483, the question involved was whether a license fee imposed by a State on corporations organized under its laws was included in Section 64 (a) of the Bankrupt Act of 1898 giving priority to taxes due a State. This case is therefore no authority on the question involved here.

In the case of Richmond vs. Bird, 249 U. S. 174, the question was as to the priority of a claim of the City of Richmond for taxes as against the claim of a landlord who had distrained for rent. The Court held that as under the laws of Virginia no superior right was given the City's unsecured claim for taxes, the landlord's claim was entitled to priority.

In the case of Pennsylvania Cement Co. vs. Bradley Contracting Co., 274 Fed. 1003, Receivers appointed in a suit in equity de-
[fol. 15] sired to declare a dividend and filed a Petition for instructions as to the attitude of the government regarding taxes under the Income Tax Law. The Court held that it had no power to compel the government to declare its attitude upon the subject, and the Receivers were instructed to pay no dividend until further ordered.

The case of In re: Hibner Oil Co., 264 Fed. 667, has already been referred to. It will thus be seen that of the nine cases relied on for the decision of the Court in the Pullen case, four involved the question of taxes, one Customs Revenue, one the recovery of money deposited by the government with the Bankrupt, one the right to priority on a Custom House Bond, the case not being in Bankruptcy, one the relative rights of the United States and of a Surety Com-

pany under Section 3468 of the Revised Statutes, and, in the last (In re Hibner), the question of priority was not raised. Necessarily the language used by the Court in these cases must be referred to the question at issue and under consideration, and I am forced to the conclusion, with all deference to the learned Court of Appeals, that the decision in the Pullen case is sustained neither by reason nor by the authorities relied on by the Court, and is not in harmony with the decision of the Supreme Court above referred to.

It is therefore ordered that the petitions for priority be and they are hereby dismissed.

Lionel K. Legge, Special Referee.

Charleston, S. C., August 21, 1922.

In United States District Court

[Title omitted]

Amended Proof of Preferred Debt

At Charleston, South Carolina, in the Eastern District of South Carolina on the — day of ——, 1922 came H. G. Glaiber, (formerly [fol. 16] agent of the U. S. Railroad Administration) of Charleston, in the County of Charleston in said District of South Carolina, and made oath, and says that Charles F. Boyd & Company, the corporation against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is justly and truly indebted to the United States in the sum of Two Thousand, Two Hundred and Seven 43/100 Dollars; that the consideration of said debt is as follows: Freight, storage and demurrage on shipments of ground hulls from Willich & Company, New Orleans, La., to Charles F. Boyd & Company, on Dec. 26, 1918, as follows:

Freight	$132.44
158 days storage	1,580.00
Demurrage	570.00
War Tax	68.47
Total	$2,350.91
Amt. realized from sale	143.48
Balance due	$2,207.43

that no part of said debt has been paid, that the ground of preference is the sovereignty of the Creditor; that there are no set-offs or counterclaims to the same and that said United States has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever, and that no note has been received for said debt and no judgment

rendered thereon to the best of deponent's knowledge, information and belief.

H. G. Glaiber.

Subscribed and sworn to before me this 28th day of June, 1922. T. Charles Siebert, Notary Public. (Seal.)

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

OBJECTIONS TO AMENDED PROOF OF PREFERRED DEBT

And now comes E. H. Pringle, Trustee of the above named Bankrupt and objects to the filing and allowance of Amended Proof of Preferred Debt subscribed and dated the 28th day of June, 1922, and filed herein on the 2nd day of February, 1923, by H. G. Glaiber, formerly agent of the United States Railroad Administration, on the following grounds:

1. Because it does not appear that H. G. Glaiber is now agent of the United States Railroad Administration and has any power or authority to execute or file any claim on behalf of the United States Railroad Administration or other department of the United States Government.

2. Because more than a year has elapsed since the adjudication in bankruptcy of the above named bankrupt and the time for the filing of claims has elapsed and it is now too late to filed the same.

3. Because the alleged Amended Proof of Debt is not sufficiently itemized or in proper form.

4. Because the alleged claimant is not entitled to priority or preference in the payment of said debt as a matter of law.

5. Because the Railroads of the United States have been turned back by the United States Government to the Companies operating [fol. 18] the same prior to the period of Government control and the period of Federal control and operation has ceased and all matters have been settled between the United States and the owners of the Railroads.

Mitchell & Horlbeck, Attorneys for Trustee in Bankruptcy.

Charleston, S. C., February 10, 1923.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PROOF OF UNSECURED DEBT

At Washington, District of Columbia, on the 21st day of February, A. D. 1923 came James C. Davis, duly appointed and qualified Director General of Railroads and made oath and says that Charles F. Boyd and Company, the Corporation by or against whom a petition for adjudication of bankruptcy has been filed was at and before the filing of said petition and still is justly and truly indebted to the United States Railroad Administration, the Director General of Railroads in the sum of Two Thousand Two Hundred and Seven and 43/100 Dollars ($2,207.43); that the consideration of said debt is as follows: Freight, storage and demurrage on shipments of ground hulls from Willich & Company, New Orleans, La., to Charles F. Boyd & Company, on December 26, 1918 as follows:

Freight	$132.44
158 days storage	1,580.00
Demurrage	570.00
War Tax	68.47
Total	$2,350.91
Amt. realized from sale	143.48
Balance due	$2,207.43

[fol. 19] that no part of said debt has been paid; that there are no set-offs or counterclaims to same and that deponent has not nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt and no judgment rendered thereon as deponent verily believes.

Preference is claimed for the debt under the authority of Sections 3466 and 3467 of the Revised Statutes of the United States.

James C. Davis, Director General of Railroads.

Subscribed and sworn to before me this 21st day of February, A. D. 1923. W. B. Robinson, Notary Public in and for the District of Columbia. (Seal.)

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OF SPECIAL REFEREE—March 5, 1923

On consideration of the amended proofs of debt filed herein by or on behalf of James C. Davis, Director General of Railroads in reference to the Seaboard Air Line Railway claims and the objections on

behalf of the Trustee in Bankruptcy and after hearing argument of counsel for all parties, it is ordered that the said claims be admitted to file as an amendment to the claims heretofore filed herein on [fol. 20] behalf of the Director General with reference to the Seaboard Air Line Railway claims.

The question of the priority claimed by the Director General has already been passed upon by the order of the Referee dated the 21st day of August, 1922, from which order no exceptions were taken on this claim and this question therefore is not now properly before the Referee for determination, and it is so ordered.

Lionel K. Legge, Special Referee.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR AN ORDER EXTENDING TIME TO FILE PETITION FOR REVIEW

To the Honorable Henry A. M. Smith, Judge of the said Court:

The Petition of James C. Davis, as Federal Agent and Director General of Railroads of the United States Railroad Administration respectfully shows unto this Honorable Court as follows:

That a claim was filed in these proceedings on or about September 28th, 1920 on behalf of Seaboard Air Line Railway Company for freight, storage and demurrage on shipments of ground hulls from Willich & Company, New Orleans, Louisiana, to Charles F. Boyd & Company in the amount of Two Thousand, Two Hundred and Seven and 43/100 ($2,207.43) Dollars, and that subsequently on or about the 6th day of February, 1922 it was requested on behalf of the Sea- [fol. 21] board that the Referee list this claim among those entitled to preference on the ground that same was a claim on behalf of the Director General of Railroads. That on the 21st day of August, 1922, L. K. Legge, Esq., Special Referee, made an order in which he found that this claim was not entitled to priority as being a claim of the United States Government. That thereafter a question having been raised as to the propriety of the execution of the claim, an amended claim was filed on or about February 3, 1923, which claim was executed by H. G. Glaiber formerly Agent of the United States Railroad Administration, and a question having arisen as to the propriety of the execution of this claim, a second amended claim was filed on or about the 27th day of February, 1923 executed by James C. Davis, Director General of Railroads, personally claiming on behalf of the Railroad Administrations the same items as are hereinabove set out, and claiming priority for the payment thereof. That the question of the allowance of priority to this claim having arisen at a hearing before the Referee, said Referee made a second order dated March 5, 1923, permitting the claim to be admitted to file as an amendment

to the claims theretofore filed as herein set out, but finding that the question of priority claimed by the Director General had already been passed upon by him in his Order dated August 21, 1922, from which order no exceptions had been taken on this claim.

That the failure to file exceptions to the Referee's Report dated August 21, 1922 was due to a misunderstanding as to what Counsel was charged with the duty of filing the same, but that Petitioner has good and valid grounds for excepting to this Report and for claiming that the claim herein referred to is entitled to priority.

Wherefore, Petitioner prays that this Honorable Court will make an order enlarging the time within which Petitioner may file a Petition for Review of the said Order of the Referee dated August 21, 1922.

And your Petitioner will ever pray etc.

Augustine T. Smythe, Attorney for Petitioner.

[fol. 22] Sworn to by Augustine T. Smythe; jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME

That the time for filing a petition to this Court for a review of the order of the Referee dated 21 August, 1922, be extended until 29th March, 1923.

Henry A. M. Smith, U. S. District Judge.

19 March, 1923.

IN UNITED STATES DISTRICT COURT

PETITION FOR REVIEW OF REFEREE'S ORDER

To the Honorable Henry A. M. Smith, Judge of the said Court:

The Petition of James C. Davis as Federal Agent and Director General of Railroads of the United States Railroad Administration respectfully shows unto this Honorable Court as follows:

1. That heretofore there was filed on behalf of the Director General of Railroads of the United States Railroad Administration, [fol. 23] Proof of Debt in the amount of Two Thousand, Two Hundred and Seven and 43/100 ($2,207.43) Dollars for freight, storage and demurrage accrued against the bankrupt, while Seaboard Air Line Railway Company was being operated under Federal control, and that there was also filed a claim for priority in the payment of this amount on the ground that the same was a claim of the United States Government. And thereafter said Proof of Debt and Claim

for Priority came before Lionel K. Legge, Esq., as Special Referee to inquire into and report upon the same.

2. That said Special Referee heretofore filed an Order dated August 21, 1922, in which he disallowed the claim of petitioner for priority in payment of said claim as aforesaid.

3. That thereafter, to-wit, on February 27, 1923, Petitioner filed with the said Lionel K. Legge an amended Proof of Claim and claim for priority, and that thereafter the said Special Referee made an Order dated March 5, 1923, ordering that such claim be admitted to file as an amendment to the claim heretofore filed on behalf of the Director General with reference to Seaboard Air Line Railway Company, but ruled that the question of the priority claimed by the Director General had already been passed upon by his Order dated August 21, 1922.

4. That such Order dated August 21, 1922, is erroneous upon the following grounds:

(a) The Special Referee erred in holding that the claim of the Petitioner for freight, storage and demurrage was not a claim of the United States and entitled to priority under the provisions of Sections 3466 and 3467, Revised Statutes of the United States.

(b) The Special Referee erred in holding that the claim of Petitioner for freight, storage and demurrage was not a preferred claim and entitled to priority under the provisions of the Bankrupt Act of Congress.

[fol. 24] 5. And your Petitioner alleges that as to both grounds the Special Referee was in error because it is undisputed that during the time when said freight, storage and demurrage accrued, Seaboard Air Line Railway Company was being operated by the Director General under Federal control; that the revenue arising therefrom became the property of the United States under legislation adopted by Congress, and that the bankrupt estate is therefore responsible to the proper representatives of the United States for all such unpaid charges in priority to the other creditors.

Wherefore, Your Petitioner feeling aggrieved because of such Order, prays that the same may be reviewed as provided in the Acts of Congress relating to bankruptcy and General Order No. 27.

Augustine T. Smythe, Attorney for Petitioner.

Sworn to by Augustine T. Smythe; jurat omitted in printing.

[fol. 25] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER CONFIRMING REFEREE'S ORDER—January 15, 1924

This matter came on to be heard upon the Special Referee's Certificate filed 26 March, 1923, and the petition for review of the

Special Referee's order dated 21 August, 1922, and the other papers attached to the certificate, and counsel for the Trustee in Bankruptcy and the petitioner James C. Davis, Federal Agent, have been heard.

The sole question is whether the claims preferred by the petitioner, James C. Davis, Federal Agent, are entitled to priority over all other claims under the provisions of Section 3466 of the Revised Statutes. In the opinion of the Court the provisions of Section 3466 do not apply to the claims of the petitioner. That Statute contemplates debts to the United States accruing to it directly under any statutory or contractual directions. The present claims do not fall into those categories. They are claims arising only incidentally to the temporary operation by the Government of the plant of a transportation corporation, operated by the Government in like manner as it would have been operated by the corporation itself had the Government not taken possession. The very description of the claims shows this. They are all for freight, storage and demurrage charges on merchandise transported as shipped by private parties. The Government in possession of the Railway plant of a corporation under- [fol. 26] took the commercial transportation of articles shipped by private persons in like manner as the same were transported by the corporation when in possession of the Railway plant and lines. For all these charges the Government Agent has a lien upon the articles transported. It was the duty of that Agent to have collected all these charges before delivery of the articles to the consignees. Having seen fit to waive that lien and deliver the articles to the consignee without collecting the charges for which he had a lien the Agent of the Government under the circumstances of this case is not entitled to a prior lien upon the general estate of the bankruptcy consignee.

It is therefore,

Adjudged That the order of the Special Referee, Lionel K. Legge, Esq., made and dated 21st August, 1922, be, and the same is hereby approved and confirmed.

Henry A. M. Smith, United States Judge.

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO FILE RECORD—February 25, 1924

It appearing that the record on appeal in the above case will not be completed in time for filing with the Clerk of the Court of Appeals as required by the Rule, it is:

Ordered, That the time for filing the record be extended thirty days from this date.

Ernest F. Cochran, United States Judge.

[fol. 27] IN UNITED STATES DISTRICT COURT

ORDER FURTHER EXTENDING TIME TO FILE RECORD—March 24, 1924

It appearing that the record on Appeal in the above case will not be completed in time for filing with the Clerk of the Circuit Court of Appeals on 25th instant, it is:

Ordered, That the time for filing the record be extended twenty days from this date.

Henry A. M. Smith, United States Judge.

IN UNITED STATES DISTRICT COURT

ORDER FURTHER EXTENDING TIME TO FILE RECORD—April 12, 1924

It appearing that the record on Appeal in the above case will not be completed in time for filing with the Clerk of the Circuit Court of Appeals on 13th instant, it is:

Ordered, That the time for filing the record be extended ten days from this date.

Henry A. M. Smith, United States Judge.

IN UNITED STATES DISTRICT COURT

ORDER RE TRANSCRIPT OF RECORD

By consent of counsel in this case:

It is ordered, That the record on appeal to the Circuit Court of Appeals, from the Order of this Court, dated January 15th, 1924, shall consist of the following papers:

1. Original proof of unsecured debt of Seaboard Air Line Railway Company, filed September 28, 1920.

[fol. 28] 2. Letter of Buist & Buist, District Counsel to L. K. Legge, Referee dated February 6th, 1922.

3. Order of Lionel K. Legge, Special Referee, dated August 21st, 1922.

4. Proof of preferred debt, dated June 28th, 1922, filed February 3rd, 1923.

5. Objections of Trustee in Bankruptcy, filed February 10th, 1923.

6. Proof of claim of James C. Davis, Director General, dated February 21st, 1923.

7. Order of L. K. Legge, Referee, dated March 5th, 1923.

8. Petition for review of Referee's order dated March 19th, 1923.

9. Petition and order extending time for review dated March 29th, 1923.

10. Order of Judge Smith, dated January 15th, 1924.

11. Petition for appeal, assignment of errors and order of Judge Smith allowing same, dated January 23rd, 1924.

It is further ordered, That no bond be required of the appellant in connection with this appeal.

It is further ordered, That the time within which the præcipe may be filed shall be and the same is hereby extended through the day of the date of this order and that this order shall constitute and stand as such præcipe.

Henry A. M. Smith, U. S. Judge.

18 March, 1924.

[fol. 29] We consent. Augustine T. Smythe, Attorney for James C. Davis, Federal Agent, Appellant. Mitchell & Harlbeck, Attorneys for Ernest H. Pringle, Trustee, Respondent.

IN UNITED STATES DISTRICT COURT

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated and agreed that the Clerk of this Court shall make up a transcript of the record in the above styled cause, and transmit the same to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Va., and that it be printed under the supervision of the Clerk of that Court in accordance with Rule 23.

Augustine T. Smythe, Counsel for Appellant. Mitchell & Horlbeck, Counsel for Appellee.

Charleston, S. C.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS

Now comes James C. Davis, Federal Agent for claims due in operation of Seaboard Air Line Railway Company and files this his assignment of errors as to the order of this Court made and filed in this matter on January 15, 1924, complaining as follows:

1. Because his Honor the District Judge erred in holding that the provisions of Sections 3466 and 3467 of the revised statutes do not apply to the claims in question.

2. Because his Honor the District Judge erred in holding that the [fol. 30] claim of the petitioner for freight, storage and demurrage is not a claim of the United States and entitled to priority under the provisions of Sections 3466 and 3467 of the revised statutes.

3. Because his Honor the District Judge erred in holding that the claim of the petitioner for freight, storage and demurrage is not a preferred claim and entitled to priority under the provisions of the Bankrupt Act.

4. Because his Honor the District Judge erred in finding that the government agent, the petitioner, waived the lien which he had on the goods in question for the carriage and storage of the same.

James C. Davis, Federal Agent, for Claims Due in Operation of Seaboard Air Line Railway Company, by Alex. Koplin, Augustine T. Smythe, His Attorneys.

IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, Richard W. Hutson, Clerk of the District of the United States for the Eastern District of South Carolina, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of Charles F. Boyd Company, Inc., Bankrupt, Ex Parte James C. Davis, Federal Agent for claims due in operation of Seaboard Air Line Railway Company, as appears by the original record now on file in my office and as directed by order in lieu of Præcipe.

Given under my hand and the seal of said Court at Charleston, in the District aforesaid, this 16th day of April, A. D. 1924.

Richd. W. Hutson, C. D. C. U. E. D. S. C. (Seal.)

31 PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 2246

JAMES C. DAVIS, FEDERAL AGENT FOR CLAIMS DUE IN OPERATION OF Seaboard Air Line Railway Company, appellant

vs.

E. H. PRINGLE, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF Charles F. Boyd Company, Inc., Bankrupt, appellee

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, AT CHARLESTON

April 19, 1924, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, and citation are certified up under Sec. 7 of Rule 14.

Same day, the appearance of Augustine T. Smythe and Alex Koplin is entered for the appellant.

May 1, 1924, the appearance of Nath. B. Barnwell and F. H. Horlbeck is entered for the appellee.

32 May 2, 1924, twenty-five copies of the printed record are filed.

Argument of Cause

June 12, 1924 (June Term, 1924), cause came on to be heard, together with No. 2245, before Woods and Waddill, Circuit Judges, and Webb, District Judge, and is argued by counsel and submitted.

33 *Opinion*

Filed September 29, 1924

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 2246

JAMES C. DAVIS, FEDERAL AGENT FOR CLAIMS DUE IN OPERATION OF Seaboard Air Line Railway Company, appellant

vs.

E. H. PRINGLE AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF Charles F. Boyd Company, Inc., Bankrupt, appellee

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, AT CHARLESTON. IN BANKRUPTCY

(Argued June 12, 1924. Decided Sept. 29, 1924)

Before WOODS and WADDILL, Circuit Judges, and WEBB, District Judge.

Alex Koplin, General Attorney for U. S. Railroad Administration, and Augustine T. Smythe (Lambert McAllister on brief) for appellant, and N. B. Barnwell (F. H. Horlbeck: Whaley, Barnwell & Grimball and Mitchell & Horlbeck on brief) for appellee.

34 WOODS, Circuit Judge:

This appeal involves the claim of the Director General to priority of the debt due by the bankrupt, accruing on the line of the Seaboard Air Line Railway Company during Federal control. The questions made are discussed and decided in the opinion filed this day in No. 2245, *Davis, Federal Agent* vs. *E. H. Pringle, Trustee.* For the reasons therein stated the decree of the District Court must be

Affirmed.

Decree

Filed and entered September 29, 1924

ITED STATES CIRCUIT COURT OF APPEALS FOURTH CIRCUIT

No. 2246

IES C. DAVIS, FEDERAL AGENT FOR CLAIMS DUE IN OPERATION OF Seaboard Air Line Railway Company, Appellant

vs.

H. PRINGLE, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF Charles F. Boyd Company, Inc., Bankrupt, Appellee

EAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

his cause came on to be heard on the transcript of the record n the District Court of the United States for the Eastern District South Carolina, and was argued by counsel.

n consideration whereof, it is now here ordered, adjudged, and reed by this Court that the decree of the said District Court, in cause, be, and the same is hereby, affirmed with costs.

C. A. WOODS,
U. S. Circuit Judge.

EPTEMBER 29, 1924.

On another day, to-wit, October 30, 1924, the mandate of this Court in this cause is issued and transmitted to the S. District Court at Charleston, South Carolina, in due form. ame day, the original petition for appeal and order allowing eal are returned to the Clerk of the U. S. District Court at rleston, South Carolina.

Clerk's certificate

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, CLAUDE M. DEAN, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 5th day of November, A. D. 1924.

[SEAL.]

CLAUDE M. DEAN,
Clerk, U. S. Circuit Court of Appeals,
Fourth Circuit.

[fol. 37] IN SUPREME COURT OF THE UNITED STATES

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit

ORDER GRANTING PETITION FOR CERTIORARI—Filed March 2, 1925

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Fourth Circuit, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

SUBMITTED

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 1035

MIDDLETON S. BORLAND, TRUSTEE, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 28, 1935.

CERTIORARI GRANTED APRIL 15, 1935.

(21,966)

(31,050)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 1085

MIDDLETON S. BORLAND, TRUSTEE, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 27, 1925

[fol. 1] **IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK**

In Bankruptcy. No. 34996

In the Matter of OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH, and THEODORE W. KNAUTH, Trading as Copartners under the Firm Name and Style of Knauth, Nachod & Kuhne, and OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, and THEODORE W. KNAUTH, Individually, Bankrupts

PROOF OF DEBT

At the City of Washington, in the District of Columbia, on the 1st day of April, A. D. 1924, came Harry S. New, Postmaster General of the United States of America, and made oath for and in behalf of the Government and the United States Post Office Department thereof, and says that the firm of Knauth, Nachod & Kuhne as a partnership and th emembers of said partnership individually, against whom a [fol. 2] petition for adjudication of bankruptcy has been filed, were at and before the filing of said petition and still are justly and truly indebted to the United States Government and to the Post Office Department thereof in the sum of One Hundred Forty-eight Thousand Four Hundred Three Dollars and two cents ($148,403.02), with interest thereon; that the consideration of said debt is as follows:

The purchase of bills of exchange and checks, photostatic copies of which are filed herewith and made a part hereof and marked exhibits 1 to 15, inclusive, together with a slip showing the date of purchase, amount, number, cost, also country to which bills and checks were to be sent, and protest fees, cable charges and interest, marked exhibit 16; that none of said bills and checks have been paid and that no part of said debt has been discharged; that there are no set-offs or counter-claims to the same, and that deponent has not nor has any person by his order or to his knowledge or belief, for the use of the Government, had or received any manner of security for said debt whatever. It is further alleged that this claim is entitled to preference according to the provisions of Section 3466 of the Revised Statutes of the United States.

Harry S. New, Postmaster General of the United States.

Subscribed and sworn to before me this 1st day of April A. D. 1924. Robert S. Regar, Notary Public. (Seal.) My commission expires August 28, 1927.

[fol. 3] EXHIBIT 2 TO PROOF OF DEBT

Knauth, Nachod & Kuhne

No. 96456. New York, May 29, 1923.

Pay to the order of Postmaster General of the United States $3,000.00 Three Thousand Dollars.

Knauth, Nachod & Kuhne.

(Endorsements omitted.)

EXHIBIT 12 TO PROOF OF DEBT

Knauth, Nachod & Kuhne

Levs. 1,156.00

No. 93174. New York, May 22, 1923.

Pay against this original check, (Duplicate unpaid) to the order of Postmaster General of United States the sum of Levs. one thousand one hundred and fifty-six.

To Banque Generale de Bulgarie, Sofia.

Knauth, Nachod & Kuhne, by E. Kuntze.

(Endorsements omitted.)

It is stipulated that Exhibits 1 to 15 inclusive, referred to in the proof of debt, are in the form of one or the other of the foregoing instruments.

Rosenberg & Ball, Attorneys for Appellant. Wm. Hayward, United States Attorney, Attorney for Appellee.

[fol. 4]

Exhibit 16 to Proof of Debt

On Money Order Account

Date purchased	Amount	Number	Cost	Sent to—	Protest fees, cable charges, interest, etc.
May 10, 1923.....	$290:11:00	89519	$1,338.71	Peru	$18.50
May 29, 1923.....	$3,000.00	96456	3,000.00	Trinidad	.....
May 29, 1923.....	$417.35	96457	417.35	Dominica	.....
May 29, 1923.....	$146.92	96458	146.92	Virgin Is.....	1.40
June 6, 1923.....	£25,000:00:00	90811	115,703.12	Gt. Britain.....	.....
June 6, 1923.....	Frs. 150,000	90833	9,746.25	France	.....
June 6, 1923.....	Kr. 50,000	90834	9,150.00	Denmark	.....
June 9, 1923.....	Frs. 100,000	93448	6,422.50	France	.....

On Postal Account

Apr. 30, 1923.....	Marks 557,846	89159	18.13	Danzig	.....
Apr. 30, 1923.....	Esc. 434.00	89160	19.30	Portugal	.....
Apr. 30, 1923.....	$1,395.48	96012	1,395.48	Spain	.....
May 22, 1923.....	Levas 1,156.00	93174	9.65	Bulgaria	.....
May 22, 1923.....	£41:5:11	93175	191.61	Dominica	.....
May 24, 1923.....	$361.02	96390	361.02	Draft on N. Y.....	.....
June 9, 1923.....	$462.78	96641	462.78	Draft on N. Y.....	.....
			$148,382.82		20.20

[fol. 5] IN UNITED STATES DISTRICT COURT

[Title omitted]

OBJECTION TO PROOF OF DEBT

To Robert P. Stephenson, Esq., referee in bankruptcy:

I, Middleton S. Borland, Trustee in this proceeding, do hereby object to the proof of debt filed on the 19th day of May, 1924, by the Postmaster General of the United States on behalf of the Government and the United States Post Office Department thereof, an alleged creditor for $148,403.02.

Said objection is made on the following grounds:

1. The amount claimed is in excess of the amount owing to the alleged creditor, the correct amount being $147,443.52.

2. Priority is claimed to which the alleged creditor is not entitled.

Dated, June 19, 1924.

Middleton S. Borland, Trustee in Bankruptcy.

[fol. 6] Sworn to by Middleton S. Borland; omitted in printing.

[fol. 7] IN UNITED STATES DISTRICT COURT

[Title omitted]

Hearing on Objections to the Claim of the U. S. Government

32 Broadway, New York City,
January 12th, 1925—10:30 a. m.

Proceeded pursuant to notice.

Messrs. Rosenberg & Ball, Attorneys for the Trustee, by Ralph F. Colin, Esq., of Counsel.

William Hayward, Esq., United States Attorney, Represented by John M. Ryan, Esq., Special Assistant to the U. S. Attorney, and Edward M. Blessing, Esq., Solicitor of the Post Office Department, of Counsel.

ARGUMENT OF COUNSEL

Mr. Colin: This is an objection, your Honor, to the claim of the Postmaster-General of the United States filed for $148,403.02.

[fol. 8] The objection by the Trustee is based on two facts: First, a small discrepancy as to the amount of the claim due to a different procedure adopted by the Trustee in calculating foreign exchange rates and, second, as to the priority feature of the claim.

At Mr. Ryan's request I supplied him with the details of the method of calculation used by the Trustee and we had some hopes

of being able to dispose of that end of the question by stipulation. Has that reached any conclusion, Mr. Ryan?

Mr. Ryan: No. The rates as furnished me are absolutely correct. I have been furnished with the rate as of the date of the filing of the petition in bankruptcy and I understand that your Honor has ruled that that is the day as of which to fix the rate of exchange. I can't find anything to the contrary but I would rather have your Honor rule without a stipulation so that there will be a formal record that I have not consented, and I will try to supply further data later.

Mr. Colin: Do I understand that you want me to prove the rates?

Mr. Ryan: No, the rates are absolutely correct, as of the date of the filing of the petition in bankruptcy.

Mr. Colin: May I then just put this on the record, that if the rate as of the date of the filing of the petition in bankruptcy is the proper rate, the proper amount of the claim should be $147,443.52.

Mr. Ryan: With the exception that we still claim this small item of $18.80 expenses for protest fees and we will furnish you with a certificate of the Postmaster-General showing how that amount was expended.

[fol. 9] Mr. Colin: In order to simplify the record I am willing to allow the protest fees.

It is stipulated that the claim, if allowed on the basis of the trustee's calculations, should be allowed in the amount of $147,462.32.

The Referee: Does that include the $18.80?

Mr. Colin: Yes. That leaves open for your Honor to decide two questions, first, whether the rate used by the Trustee is the proper one——

The Referee: How does the proof of claim read?

Mr. Ryan: For the record, perhaps we might inform his Honor exactly how the claim arises.

As you already know, the Post Office Department issues foreign money orders and, of course, the foreign countries issue orders on this country and at certain times there is an accounting and a balance struck. That is what happened in this case, a balance was struck.

Now the practice has been for the Postmaster-General to purchase drafts with which to pay the balances and in this case he went to Knauth, Nachod & Kuhne and purchased these drafts—the drafts are payable to the Postmaster-General and he endorses them to the different countries. That is how the claim arises; these are the balances due on money order accounts, and when the rate of exchange was figured for the proof of claim, the rate was figured as of the date of the purchases of these drafts. They were purchased on different dates beginning in May, 1923, and ending on June 9th, 1923.

I might state that the statement furnished me by the Trustee in bankruptcy shows that in certain cases the rates are higher, or were higher on the day the petition in bankruptcy was filed than on the [fol. 10] day on which the drafts were purchased.

Mr. Colin: I may say, your Honor, that we are simply raising this question in order not to have a precedent against us. The whole

difference on the claim is about a thousand dollars, but we don't want to waive the question; we want to keep the practice uniform.

The Referee: I have ruled before, Mr. Ryan, in these cases, that the filing of the petition in bankruptcy is a breach of the contract—the Supreme Court has held that—and it is the damages which are suffered at that time. That is the reason I ruled that it is the rates applying at that time rather than at the time of the purchase. On that theory I rule against you and allow the claim for $147,462.32 and I will hear argument on whether it is to be a priority claim.

(Then followed oral argument.)

Hearing closed.

Decision reserved.

[fol. 11] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION OF REFEREE—January 21, 1925

Proof of claim filed by the Postmaster-General, claiming $148,403.02, being the total amounts paid by the Postmaster-General for drafts on foreign countries, issued by the Bankrupts, together with protest fees and cable charges.

Priority is claimed under Section 64b(5) of the Bankruptcy Act and Section 3466 of the Revised Statutes. The Trustee objects to [fol. 12] the amount of the claim as based upon the amounts paid for the drafts, but admits there is a valid claim for $147,462.32. This, as admitted, was the value of the foreign drafts on the date of the bankruptcy, June 15, 1923. The Trustee further objects to its being a priority claim.

William Hayward, Esq., United States Attorney.

John M. Ryan, Esq., United States Ass't Attorney, of Counsel for the claimant.

Rosenberg & Ball, Esqs., for the trustee.

STEPHENSON, Referee:

The amount of the claim should be reduced to $147,462.32, as this was the value of the drafts purchased by the claimant at the time of the breach.

On the question of priority, the decisions are in conflict. Davis vs. Pringle, 1 F. (2d) 860 (C. C. A.—4th—September 29, 1924) holds that the Government is not entitled to priority. In re Tidewater Coal Exchange, 280 Fed. 648, (C. C. A.—2nd) holds that the United States is entitled to priority. In my opinion, the United States is entitled to priority for these reasons:

The Bankruptcy Act of 1898 was intended to cover completely all matters of adjudication, administration, discharge, priorities and

distribution of assets, and it supplanted any previous inconsistent statutes. (Guaranty Company vs. Title Guaranty Company, 224 U. S. 152). Under Section 64b, the order of priority is specified. It includes administration expenses, wages, and next "(5) debts owing to any person, who, by the laws of the States or the United States is entitled to priority." Under a law of the United States (Revised Statutes—Section 3466), the United States is given priority [fol. 13] in bankrupt estates. If, therefore, the word "person" in Section 64b(5) of the Bankruptcy Act includes the United States, it is entitled to priority.

"Person" is defined as follows: "'Persons' shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations"; and Section 1a of the Act provides "The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows." The word "person" must, therefore, be construed as defined unless inconsistent with the context. Resort, therefore, should not be had to the history of bankruptcy legislation or to the proceedings of Congress leading to its enactment, for this takes one beyond the context of the Act and into fields of investigation to which Courts should not venture except in cases where the meaning is clearly uncertain. There is nothing in the context of the Bankruptcy Act to limit the meaning of the word "person" under Section 64b(5) to either natural persons or private corporations. In my opinion, it therefore includes the United States which is a corporation sovereign. Although the sovereign is not bound by statutes (unless expressly named) which diminish his rights, he is included (although not expressly named) in statutes which confer rights. (Stanley vs. Schwabley, 147 U. S. 508). In that case it was held [fol. 14] that the United States was a "person" who could plead the Statute of Limitations though it was not bound by such Statute.

The decision in Davis vs. Pringle, supra, is based upon a sentence in the concurring part of a dissenting opinion, and upon the Court's deductions from an examination of previous bankruptcy legislation and the proceedings in Congress which led to the present Act. In construing the word "person" in an Act where the meaning of that word is defined, I do not believe the previous legislation and the proceedings of Congress are helpful.

Settle order on notice, allowing the claim for $147,462.32, and granting a priority subsequent to the priorities of taxes, administration expenses and wages.

[fol. 15] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OF REFEREE—January 27, 1925

On the proof of debt filed herein by the United States Government through the Post Master General thereof, Harry S. New, Esq., verified the first day of April, 1924, the objection to said claim by Middleton S. Borland, Esq., Trustee in Bankruptcy herein, verified the nineteenth day of January, 1925, and the notice of hearing on said objection, and on the evidence offered herein with respect to the [fol. 16] amount of said claim, and after hearing Ralph F. Colin, Esq., of counsel for the Trustee, in support of said objection and John M. Ryan, Esq., of counsel for the United States Government in opposition thereto, it is now, after due consideration and on motion of William Hayward, Esq., United States attorney for the Southern District of New York.

Ordered that the claim of the United States Government through its Post Master General be and the same hereby is allowed in the amount of $147,462.32 as a priority claim against the estate of Knauth, Nachod & Kuhne, one of the above named bankrupts, to be paid subsequent to the payment of taxes, administration expenses and wage claims as provided for in Section 64a and in subdivisions (1), (2), (3), and (4) of Section 64b of the Bankruptcy Act of 1898.

Robert P. Stephenson, Referee in Bankruptcy.

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF TRUSTEE TO REVIEW

To the Honorable Robert P. Stephenson, referee in bankruptcy:

The petition of George G. Ernst respectfully shows:

1. Your petitioner is a member of the firm of Rosenberg & Ball, attorneys for Middleton S. Borland, Trustee herein. This petition is made by your petitioner and not by the Trustee in person because of the fact that the Trustee is ill and away from his office.

[fol. 18] 2. In the course of the proceedings and on the 27th day of January, 1925, an order, a copy of which is hereto annexed, was made and entered herein.

3. Such order was and is erroneous in that it allows the claim of the United States Government through its Post Master General in the amount of $147,462.32, filed herein, as a priority claim against

the estate of Knauth, Nachod & Kuhne, one of the bankrupts above named.

Wherefore your petitioner, on behalf of the Trustee in Bankruptcy, feeling aggrieved because of such order, prays that the same may be reviewed as provided in the Bankruptcy Act of 1898 and General Order No. XXVII.

Dated, New York, January 27th, 1925.

George G. Ernst, Petitioner.

Sworn to by Geo. G. Ernst, Jurat omitted in printing.

[fols. 19 & 20] Order of Referee—Omitted; printed side page 15 ante

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[fol. 21] In United States District Court

[Title omitted]

Referee's Certificate

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

I, Robert P. Stephenson, Referee in charge of the above entitled matter, pursuant to the petition to review herein, hereby certify the following papers:

[fol. 22] (1) Petition to review of George G. Ernst, on behalf of the Trustee in Bankruptcy herein, verified January 27, 1925.

(2) Order of the Referee, dated January 27, 1925, to be reviewed by said petition.

(3) Proof of claim of the Postmaster General of the United States, verified by Harry S. New on April 1, 1924.

(4) Objection to the proof of claim made by the Trustee, dated June 19, 1924.

(5) Opinion of the Referee, dated January 21, 1925, reducing the claim, and granting the priority.

(6) Record of the proceedings at the hearing on the objection to the claim.

Dated, January 30, 1925.

Robert P. Stephenson, Referee in Bankruptcy.

[fol. 23] IN UNITED STATES DISTRICT COURT

MEMORANDUM OF A. N. HAND, J., ON AFFIRMING REFEREE'S ORDER

HAND, J.:

Report affirmed on authority of Tidewater Coal Exchange, 280 Fed., 648.

[fol. 24] IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT—February 4, 1925

This cause having come on to be heard on January 31, 1925, upon the petition of the Trustee herein to review the order of the Referee in Bankruptcy dated January 27, 1925, allowing a claim in favor of the United States of America in the sum of $147,462.32, as a priority claim, as in said order set forth, after hearing counsel, it is

Ordered and decreed that the order of the Referee, dated January [fol. 25] 27, 1925, be and the same hereby is in all respects affirmed and the aforesaid petition to review the said order be and the same hereby is dismissed.

Further ordered and decreed that the claim of the United States of America through its Postmaster General be and the same hereby is allowed in the amount of $147,462.32, as a priority claim against the estate of Knauth, Nachod & Kuhne, one of the above named bankrupts, to be paid subsequent to the payment of taxes, administration expenses, and wage claims, as provided for in Section 64(a) and in Subdivisions 1, 2, 3, and 4, of Section 64(b) of the Bankruptcy Act of 1898.

Dated, New York, February 4, 1925.

Augustus N. Hand, U. S. D. J.

No objection as to form. Wm. Hayward, U. S. Atty., Atty. for U. S. Claimant.

[fol. 26] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR AND ORDER ALLOWING APPEAL—February 4, 1925

To the United States District Court for the Southern District of New York:

Middleton S. Borland, Esq., as Trustee in Bankruptcy of the above named bankrupt Knauth, Nachod & Kuhne, respectfully shows that

on February 4th, 1925, an order and decree were made in the United States District Court for the Southern District of New York affirming an order of the Referee in Bankruptcy dated January 27, 1925, [fol. 27] allowing the claim of the United States of America through its Postmaster General in the amount of $147,462.32, as a priority claim, as against the estate of Knauth, Nachod & Kuhne, to be paid subsequent to the payment of taxes, administration expenses and wage claims, as provided for in Section 64(a) and in Subdivisions 1, 2, 3, and 4 of Section 64(b) of the Bankruptcy Act of 1898.

Said Middleton S. Borland, as Trustee aforesaid, the petitioner herein, deeming himself aggrieved by the said order and decree hereby appeals from the said order and decree to the United States Circuit Court of Appeals for the Second Circuit, for the reason specified in the assignment of errors filed herewith.

And your petitioner prays that he may be allowed an appeal herein and that a transcript of the record, proceedings and papers in said proceeding, duly authenticated, may be transmitted to the said Circuit Court of Appeals.

Dated New York, February 4, 1925.

Rosenberg & Ball, Attorneys for Trustee.

Office & P. O. Address, 74 Broadway, Borough of Manhattan, City of New York.

It is ordered that the appeal, as above prayed for, be allowed.

Augustus N. Hand, U. S. D. J.

[fol. 28] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

Middleton S. Borland, as Trustee in Bankruptcy of the above named bankrupt Knauth, Nachod & Kuhne, by Rosenberg & Ball, his attorneys, assigns the following errors of the District Court upon his appeal to the Circuit Court of Appeals for the Second Circuit from the order and decree of said District Court, dated February, 4, 1925:

[fol. 29] (1) The District Court erred in affirming the order of the Special Master allowing the claims of the United States of America through its Postmaster General as a priority claim.

(2) The District Court erred in holding that the United States of America was entitled to priority in payment of its said claim filed through its Postmaster General over the claims of the general creditors of the said bankrupt Knauth, Nachod & Kuhne.

Dated New York, February 4, 1925.

Rosenberg & Ball, Attorneys for Trustee.

Office and P. O. Address, 74 Broadway, New York City.

[fol. 30] CITATION—In usual form; omitted in printing

[fol. 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated and agreed that the foregoing is a true [fol. 32] transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated New York, February 18th, 1925.

Rosenberg & Ball, Attorneys for Appellant. William Hayward, United States Attorney, Attorney for Appellee.

[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United [fol. 34] States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 18th day of February in the year of our Lord one thousand nine hundred and twenty-five and of the Independence of the said United States the one hundred and forty-ninth.

Alex. Gilchrist, Jr., Clerk. (Seal.)

[fol. 35] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of OSCAR L. GUBELMAN et al., Trading as Copartners under the Firm Name and Style of Knauth, Nachod & Kuhne, etc., Bankrupts; MIDDLETON S. BORLAND, Trustee in Bankruptcy, Appellant; UNITED STATES OF AMERICA, Appellee.

Before Rogers, Hough, and Hand, Circuit Judges

Rosenberg & Ball, for trustees; Godfrey Goldmark, George G. Ernst, of counsel.

Emory R. Buckner, United States Attorney, for appellee; John M. Ryan, Special Assistant United States Attorney, of counsel.

OPINION

Per CURIAM:

Order affirmed on the authority of In re Tidewater Coal Exchange, 280 Fed. 648.

[fols. 36 & 37] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

JUDGMENT—April 13, 1925

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. W. R.
C. M. H.

[fol. 38] IN UNITED STATES CIRCUIT COURT OF APPEALS

CLERK'S CERTIFICATE

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 37 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of In the Matter of Oscar L. Gubelman, et al., trading as copartners under the firm name and style of Knauth, Nachod & Kuhne, etc., Bankrupts, Middleton S. Borland, Trustee in Bankruptcy, Appellant, United States of America, Appellee, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 14th day of April in the year of our Lord One Thousand Nine Hundred and twenty five and of the Independence of the said United States the One Hundred and forty ninth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals Second Circuit.)

[fol. 39] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 27, 1925

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

It is further ordered that this cause be, and the same is hereby, advanced and assigned for argument with cases Nos. 786 and 787 heretofore assigned for Monday, May 4th next. The case to be submitted on printed briefs on that date, with the alternative to counsel to present this case on oral argument on Monday November 2d next, after the cases heretofore assigned for that day.

Office Supreme Court, U.S.
FILED
DEC 26 1924
WM. R. STANSBURY
Clerk

No. 786

In the Supreme Court of the United States

OCTOBER TERM, 1924

JAMES C. DAVIS, DIRECTOR GENERAL AND AGENT (ATLANTIC COAST LINE RAILROAD), PETITIONER

v.

E. H. PRINGLE, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF CHARLES F. BOYD COMPANY, INC., BANKRUPT, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

By STUART STITES,
A. A. McLAUGHLIN,
ALEX KOPLIN,
LAWRENCE McCLANATHAN,
Counsel for Petitioner.

WASHINGTON: GOVERNMENT PRINTING OFFICE: 1924

In the Supreme Court of the United States

OCTOBER TERM, 1924

JAMES C. DAVIS, DIRECTOR GENERAL AND AGENT (ATLANTIC COAST LINE RAILROAD), PETITIONER

v.

E. H. PRINGLE, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF CHARLES F. BOYD COMPANY, INC., BANKRUPT, RESPONDENT

NOTICE

To E. H. Pringle, as Trustee in Bankruptcy of the Estate of Charles F. Boyd, Inc., Bankrupt, or Mitchell and Horlbeck, and Whaley, Barnwell & Grimball, his Attorneys of Record:

This is to notify you that the petitioner will, on the 5th day of January, 1925, or as soon thereafter as counsel may be heard, present to the Supreme Court of the United States, in its court room at Washington, D. C., his motion for a writ of certiorari upon his verified petition and a copy of the entire record in this cause; and a copy of said motion, said petition and brief accompanying

same are herewith delivered to you this 5th day of December, 1924.

JAMES C. DAVIS,
Director General and Agent,
By SIMEON HYDE,
A. A. MCLAUGHLIN,
ALEX. KOPLIN,
LAMBERT MCALLISTER,
Counsel for Petitioner.

ACCEPTANCE OF SERVICE

The foregoing notice, and delivery of copy thereof and of motion and petition for writ of certiorari and brief are hereby acknowledged this 5th day of December, 1924.

WHALEY, BARNWELL & GRIMBALL,
MITCHELL AND HORLBECK,
Attorneys for Respondent.

In the Supreme Court of the United States

OCTOBER TERM, 1924

JAMES C. DAVIS, DIRECTOR GENERAL AND AGENT (ATLANTIC COAST LINE RAILROAD), PETITIONER

v.

E. H. PRINGLE, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF CHARLES F. BOYD COMPANY, INC., BANKRUPT, RESPONDENT

MOTION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

Now comes James C. Davis, Director General and Agent, petitioner, by his counsel, and moves this Honorable Court that it will by certiorari, or other process, directed to the Honorable Judges of the United States Circuit Court of Appeals for the Fourth Circuit, require said Court to certify to this Court for its review and determination a certain cause in said United States Circuit Court of Appeals for the Fourth Circuit lately pending, wherein the petitioner, James C. Davis, Director General and Agent, was appellant and E. H. Pringle, as Trustee in Bankruptcy of the estate of Charles F. Boyd Company, Inc., Bankrupt, was appellee; and to that end the petitioner now tenders here-

with his petition and brief with a certified copy of the entire record in said cause in said United States Circuit Court of Appeals for the Fourth Circuit.

SIMEON HYDE,
A. A. MCLAUGHLIN,
ALEX. KOPLIN,
LAMBERT MCALLISTER,
Counsel for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1924

JAMES C. DAVIS, DIRECTOR GENERAL AND AGENT (ATLANTIC COAST LINE RAILROAD), PETITIONER

v.

E. H. PRINGLE, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF CHARLES F. BOYD COMPANY, INC., BANKRUPT, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of James C. Davis, Director General and Agent, hereinafter called petitioner, respectfully shows to this Honorable Court:

1. On January 15, 1924, Honorable H. A. M. Smith, United States District Judge for the Eastern District of South Carolina, in bankruptcy, affirmed the report of Lionel K. Legge, Esq., Special Referee in the matter of Charles F. Boyd, Inc., bankrupt, denying priority to a claim filed in the bankruptcy proceedings by petitioner.

The claim filed by petitioner for $2,213.70, duly itemized, covered freight, storage, and demurrage earned and accruing on and between April 19, 1918, and June 10, 1918; and on and between April 29, 1918, and August 27, 1918, on shipments to Charles F. Boyd & Company, Charleston, S. C.

These claims accrued in the operation during the period of Federal control of railroads by the Director General of Railroads of the properties of the Atlantic Coast Line Railroad.

No question was raised as to the amount due by the bankrupt to petitioner. The sole question raised on the record was whether the claims of petitioner were entitled to priority in the distribution of the assets of the bankrupt under the provisions of Sections 3466 and 3467 of the Revised Statutes of the United States and Section 64 (*b*) 5 of the Bankruptcy Act of 1898 (30 Stat. 544). In the opinion confirming the Referee's order the District Court said:

> The sole question is whether the claims preferred by the petitioner, James C. Davis, Federal Agent, are entitled to priority over all other claims under the provisions of Section 3466 of the Revised Statutes. In the opinion of the Court the provisions of Section 3466 do not apply to the claims of the petitioner. That Statute contemplates debts to the United States accruing to it directly under any statutory or contractual directions. The present claims do not fall into those categories. They are claims arising

only incidentally to the temporary operation by the Government of the plant of a transportation corporation, operated by the Government in like manner as it would have been operated by the corporation itself had the Government not taken possession. The very description of the claims shows this. They are all for freight, storage, and demurrage charges on merchandise transported as shipped by private parties. The Government in possession of the Railway plant of a corporation undertook the commercial transportation of articles shipped by private persons in like manner as the same were transported by the corporation when in possession of the Railway plant and lines. For all these charges the Government Agent has a lien upon the articles transported. It was the duty of that Agent to have collected all these charges before delivery of the articles to the consignees. Having seen fit to waive that lien and deliver the articles to the consignee without collecting the charges for which he had a lien, the Agent of the Government under the circumstances of this case is not entitled to a prior lien upon the general estate of the bankrupt consignee.

2. An appeal was taken from the order of the District Court to the United States Circuit Court of Appeals for the Fourth Circuit. Upon this appeal on June 12, 1924, a hearing was had in the United States Circuit Court of Appeals for the Fourth Circuit, and on September 29, 1924, the court rendered an opinion affirming the decision

of the District Court. A copy of this decision is hereto attached as Exhibit "A."

3. The Circuit Court of Appeals for the Fourth Circuit in affirming the judgment of the lower court held, under the decision of this Court in the case of *Du Pont* v. *Davis,* 264 U. S. 456, that debts due to petitioner were debts due to the United States, but held that the United States was not entitled to priority in the distribution of assets of a bankrupt estate except for taxes, and therefore affirmed the decision of the District Court.

4. The opinion of the Circuit Court of Appeals states that its conclusion is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit *In re Tidewater Coal Exchange,* 280 Fed. 648, and of the Circuit Court of Appeals for the Eighth Circuit *In re Western Implement Company,* 171 Fed. 81.

5. Petitioner respectfully submits that the Circuit Court of Appeals for the Fourth Circuit in affirming the judgment of the District Court for the Eastern District of South Carolina erred as a matter of law in holding,

(*a*) that the United States was not a " person " within the meaning of Section 64 (b) 5 of the Bankruptcy Act of 1898, and

(*b*) that the United States was not entitled to priority in bankruptcy except for taxes.

6. That the judgment of the Circuit Court of Appeals in this case is a final judgment.

7. The judgment of the Circuit Court of Appeals for the Fourth Circuit being one arising in bankruptcy is final and is reviewable by this Court only by certiorari under the provisions of the Act of September 6, 1916 (C. 448, 39 Stat. 726).

8. Certiorari should be granted in this case because the question involved is one of great public importance, since the effect of the decision is to deny to the United States priority in bankruptcy except for taxes.

9. The question involved is also one which calls for a decision by the Court in order to settle and harmonize the conflicting decisions of the Circuit Court of Appeals for the second, eighth, and fourth circuits.

Wherefore, upon due consideration of this petition, of the annexed brief, and a certified copy of the record of the United States Circuit Court of Appeals for the Fourth Circuit filed herewith, petitioner respectfully prays that a writ of certiorari be issued under the seal of this court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding that court to certify and send to this court on a date to be designated a full and complete transcript of the record of all proceedings had in this cause to the end that the same may be reviewed and determined by this honorable court under said writ as provided by law. And petitioner prays that upon the final consideration of this cause and of said writ, the said judgment of the United States Circuit Court of Ap-

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peals for the Fourth Circuit will be reversed by this honorable court and judgment rendered in favor of the petitioner.

Petitioner further prays for such other equitable and general relief as may appertain to this case and as may be competent for this honorable court to grant.

SIMEON HYDE,
A. A. MCLAUGHLIN,
ALEX. KOPLIN,
LAMBERT MCALLISTER,
Counsel for Petitioner.

DISTRICT OF COLUMBIA,
City of Washington, to wit:

Before me, the undersigned notary public, personally appeared A. A. McLaughlin, who, being duly sworn, deposes and says: That he is a member of the bar of the Supreme Court of the United States, and is of counsel for petitioner herein; that he has read the foregoing application for a writ of certiorari; and that all the facts therein stated are true and correct to the best of his knowledge and belief.

A. A. MCLAUGHLIN.

Subscribed and sworn to before me this 3d day of December, 1924.

W. B. ROBINSON.
Notary Public, District of Columbia.
My Commission Expires March 23, 1925.

In the Supreme Court of the United States

OCTOBER TERM, 1924

JAMES C. DAVIS, DIRECTOR GENERAL AND AGENT (ATLANTIC COAST LINE RAILROAD), PETITIONER,

v.

E. H. PRINGLE, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF CHARLES F. BOYD COMPANY, INC., BANKRUPT, RESPONDENT.

BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI

I

THE COURT ERRED IN HOLDING THAT THE UNITED STATES WAS NOT ENTITLED TO PRIORITY EXCEPT FOR TAXES

The sole question involved in this case is whether the United States is entitled to priority in bankruptcy for debts other than taxes.

It is admitted that prior to the passage of the Bankruptcy Act of 1898 (30 Stat. 544), the United States was entitled to priority for all debts. (*Lewis, Trustee,* v. *U. S.,* 92 U. S. 618.)

The provisions of section 64 of the Bankruptcy Act of 1898, as amended, are as follows:

> *a.* The court shall order the trustee to pay all taxes legally due and owing by the

bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

b. The debts to have priority, except as herein provided, and to be paid in full out of the bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the position; (2) the filing fees paid by the creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the

> court may allow; (4) wages due to workmen, clerks, traveling or city salesmen, * * * or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority.
>
> *c.* In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication.

Petitioner contends that under the provisions of section 64 (*b*) 5, *supra*, the United States is entitled to priority for debts other than taxes, since a debt to the United States is one which "by the laws of * * * the United States is entitled to priority." Section 3466 of the Revised Statutes is as follows:

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is in-

> sufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law as to cases in which an act of bankruptcy is committed.

It is well to bear in mind the rule of construction uniformly followed by this Court that Acts granting priority being based on public policy are to be construed liberally.

In *United States* v. *State Bank of North Carolina*, 6 Peters 29, this Court said:

> The right of priority of payment of debts due to the Government is a prerogative of the crown well known to the common law. It is founded not so much upon any personal advantage to the sovereign as upon motives of public policy, in order to secure an adequate revenue to sustain the public burdens and discharge the public debts. The claim of the United States, however, does not stand upon any sovereign prerogative, but is exclusively founded upon the actual provisions of their own statutes. The same policy which governed in the case of the royal prerogative may be clearly traced in these statutes; and as that policy has mainly a reference to the public good, there is no reason for giving to them a strict and narrow inter-

> pretation. Like all other statutes of this nature they ought to receive a fair and reasonable interpretation, according to the just import of their terms.

See also *U. S.* v. *Fisher,* 2 Cranch, 358.

The terms of the Acts involved are clear and we "must take the law as we find it." (*U. S.* v. *Gooding,* 12 Wheaton, 460–478.)

Section 64 (*b*) 5 contains the words "debts owing to any person who by laws of * * * the United States is entitled to priority," and section 3466 contains the words "debts due the United States." Petitioner, therefore, contends that Revised Statutes 3466 created the priority referred to in the above quoted provisions of section 64 (*b*) 5 of the Act of 1898.

To sustain the position taken by the Circuit Court of Appeals for the Fourth Circuit this court must hold either (*a*) that section 3466 was repealed by the passage of the Bankruptcy Act of 1898, or (*b*) that the United States is not a "person" within the meaning of section 64 (*b*) 5.

SECTION 3466, REVISED STATUTES, WAS NOT REPEALED BY THE PASSAGE OF THE BANKRUPTCY ACT OF 1898

It is elementary that a repeal will not be implied unless there is an irreconcilable conflict between the statutes (*Harford* v. *U. S.,* 8 Cranch 109; *North American Commercial Company* v. *U. S.,* 171 U. S. 110, 129), and that this court should so construe the statutes as to give effect to both, if possible.

In fact this court in the case of *Guarantee Title & Trust Co.* v. *Title Guaranty & Surety Co.,* 224 U. S. 152, held that section 3466 of the Revised Statues and the Bankruptcy Acts of 1867 and 1898 should be construed in *pari materia* and that the Act of 1898 superceded Revised Statutes 3466, only in so far as the two statutes were inconsistent.

That section 3466 Revised Statutes was not repealed by the Bankruptcy Act of 1898 is clearly indicated by the decisions of this court in *U. S.* v. *National Surety Co.,* 254 U. S. 73; *Sloan Shipyards* v. *U. S. Fleet Corporation,* 258 U. S. 549, and *U. S.* v. *Oklahoma,* 261 U. S. 253.

There is no inconsistency in holding as this court did in the *Guarantee case, supra,* that except as to taxes, debts due the United States were deferred until certain other claims such as labor had been paid, as that was clearly the intention of Congress in passing the Act of 1898.

THE UNITED STATES IS A "PERSON" WITHIN THE MEANING OF SECTION 64 (B) 5 OF THE BANKRUPTCY ACT

That the United States is a "person" within the meaning of section 64 (*b*) 5 was decided by the Circuit Court of Appeals for the Second Circuit in *In re Tidewater Coal Exchange,* 280 Fed. 648. See also *In re Western Implement Co.,* 170 Fed. 81.

The decision of the lower court in this case admits that the conclusion reached by it is in conflict with the decision of the Circuit Court of Appeals

for the Second Circuit in the case of *In re Tidewater Coal Exchange,* 280 Fed. 648, in which the same question was involved. In that case the court said:

> The Circuit Court of Appeals for the Seventh Circuit, in *In re E. H. Hibner Oil Co.,* 264 Fed. 667, A. L. R. 629, declared that unpaid freight charges for shipments by railroad during the period of federal control are the property of the United States, and the claim therefore is entitled to priority in bankruptcy under section 62(*b*) of the Bankruptcy Act (Comp. St. sec. 9648) and section 3466 of the Revised Statutes (Comp. St. Sec. 6372). The Bankruptcy Acts of 1800 (Act April 4, 1800, c. 19, sec. 62 (2 Stat. 36)), of 1841 (Act August 19, 1841, c. 9, sec. 5 (5 Stat. 444)), and of 1867 (Act March 2, 1867, c. 176, sec. 28 (14 Stat. 530)) expressly recognized the priority of debts due the United States, thus preserving in all its essential features the provision in the act of 1797, reproduced in section 3466 of the Revised Statutes relating to priorities. The Bankruptcy Act of 1898 contains no similar express provision; and, if, under that act, priority is given, it must be because of clause 5, subd. (*b*), Sec. 64 (Comp. St. Sec. 9648), which reads as follows:
>
> "(5) Debts owing to any person who by the laws of the states or the United States is entitled to priority."

> We have no doubt that the United States is to be regarded as a person within the meaning of the clause cited, and can assert its priority as given to it under section 3466 of the Revised Statutes (Comp. St. Sec. 6372), which is reproduced in the margin. The priority secured to the United States is priority over all creditors. The statutory provision referred to is simply declaratory of the common-law rule which entitles a sovereign to priority over other creditors of an insolvent. *United States* v. *National Surety Co.*, 254 U. S. 73, 75, 41 Sup. Ct. 29, 65 L. Ed. 143.

The attention of this court is directed to the fact that an application for certiorari in the last cited case was denied (*Davis* v. *Coyle,* 260 U. S. 721), and that on the application respondent suggested to this court that in view of the dissent in the case of *Sloan Shipyards* v. *U. S. Fleet Corporation,* 258 U. S. 549, the writ of certiorari should be granted.

Petitioner submits that the decision of the lower court in this case is not only in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the *Tidewater case, supra,* but is also in conflict with the decision of this court in the case of *U. S.* v. *National Surety Company,* 254 U. S. 73; *U. S.* v. *Oklahoma,* 261 U. S. 253, and with the decisions of the Circuit Courts of Appeals for the seventh and eighth circuits in the cases of *In re Hibner*

Oil Co., 264 Fed. 667, and *In re Western Implement Co.,* 170 Fed. 81, as well as with the decision of Judge Rose of the Circuit Court of Appeals for the Fourth Circuit in the case of *In re Atlantic G. & P. Steamship Co.,* 289 Fed. 146.

Petitioner also suggests that the decision in this case is in actual conflict with the decision of the lower Court in the case of *Lott* v. *Salisbury,* 237 Fed. 191, in which that Court said, page 203:

> The case most strongly relied upon is *Guarantee Title & Trust Co.* v. *Title Guarantee & Trust Co.,* 224 U. S. 152, 32 Sup. Ct. 457, 56 L. Ed. 706. That case holds that the United States, except for taxes due, had not in the enactment of the bankruptcy law exercised its sovereign right of providing a preference for its own claims against the bankrupt. It is conceded that the government has such a right and frequently exercises it. In the case just referred to the Court held that the government had, except as to taxes, put itself in the plight of an ordinary unsecured creditor and under section 64b was postponed till certain claims, wages among others, were paid.

The attention of this court is directed to the fact that the Circuit Courts of Appeal for the First and Fifth Circuits have held that the Director General is entitled to priority in receivership proceedings. (*Davis* v. *Pullen,* 277 Fed. 650; *Davis* v. *Miller Link Lumber Co.,* 296 Fed. 649.)

Petitioner respectfully submits that this Court in the *Guarantee case, supra,* merely held that claims of the United States except for taxes were subordinated to labor claims by the Act of 1898, and that the dissent in the *Sloan case, supra,* can not be considered as controlling in this case.

If the position of the Circuit Court of Appeals for the Fourth Circuit in this case is correct then it was not necessary for the majority of this Court to base its decision in the *Sloan case, supra,* on the ground that a debt due the Fleet Corporation was not a debt due the United States; nor was it necessary for this Court to pass on the question involved in *U. S.* v. *National Surety Co.,* 254 U. S. 73, since a finding by the court that the United States was not entitled to priority except for taxes would have disposed of these cases.

It is respectfully submitted, therefore, that the Circuit Court of Appeals for the Fourth Circuit erred in its conclusion in the instant case and that this court should grant the petition for certiorari in order that the error may be corrected.

THE QUESTIONS INVOLVED ARE OF SUCH IMPORTANCE WRIT OF CERTIORARI SHOULD BE GRANTED

It is submitted that the writ herein should be granted since the question involved in this case is one of great public interest, of gravity and importance (*In re Lau Ow Bew,* 141 U. S. 583), and that the writ should be granted in order that the conflict in the decisions of the various courts may

be corrected. (*Forsythe* v. *Hammond,* 166 U. S. 514, and *The Three Friends,* 166 U. S. 49.)

Respectfully submitted.

SIMEON HYDE,
A. A. MCLAUGHLIN,
ALEX. KOPLIN,
LAMBERT MCALLISTER,
Counsel for Petitioner.

EXHIBIT A

United States Circuit Court of Appeals Fourth Circuit

JAMES C. DAVIS, FEDERAL AGENT FOR Claims Due in Operation of Atlantic Coast Line Railroad Company, Appellant *versus* E. H. PRINGLE AS TRUSTEE IN BANKRUPTCY of the Estate of Charles F. Boyd Company, Inc., Bankrupt, Appellee	No. 2245

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston. In Bankruptcy. (Argued June 12, 1924. Decided Sept. 29, 1924.)

Before Woods and Waddill, Circuit Judges, and Webb, District Judge.

Alex Koplin, general attorney for U. S. Railroad Administration (Simeon Hyde; Lambert McAllister and Rutledge, Hyde, Mann & Figg on brief) for Appellant, and N. B. Barnwell (F. H.

Horlbeck; Whaley, Barnwell & Grimball, and Mitchell & Horlbeck on brief) for Appellee.

WOODS, *Circuit Judge:*

Charles F. Boyd Company, Inc., was adjudged bankrupt on August 20, 1920. The Director General on February 3, 1921, filed claims amounting to $2,213.70 for freight, storage, and demurrage accruing to the Atlantic Coast Line Railroad Company during Federal control. Afterwards, on February 27, 1922, the Director General by petition claimed priority over general creditors in the distribution of the assets. No point seems to have been made before the referee or the District Court that the claim for priority was not properly set up.

If demurrage, freight, and storage charges in favor of the Director General are debts due to the United States, and as such are entitled to priority, the priority was inherent in the debts and required recognition by the court when called to its attention at any time before distribution of the assets.

The referee reported against the claims of priority and the district judge confirmed his report.

We are unable to agree with the referee and the district judge that the debts due to the Director General were not debts due to the United States of the character given priority by section 3466 of the Revised Statutes. The Supreme Court has decided otherwise. In *DuPont* v. *Davis,* April 7, 1924, the court says: "In taking over and operating the railroad systems of the country the United States did so in its sovereign

capacity, as a war measure, ' under a right in the nature of eminent domain.' *North Carolina R. R. Co.* v. *Lee,* 260 U. S. 16; *Missouri Pacific R. R. Co.* v. *Ault,* 256 U. S. 554; *Northern Pacific R. R. Co.* v. *North Dakota,* 250 U. S. 135; *In re Tidewater Coal Exchange,* 280 Fed. 648, 649; and it may not be held to have waived any sovereign right or privilege unless plainly so provided. Moneys and other property derived from the operation of the carriers during Federal control, as we have seen, are the property of the United States, sec. 12, 40 Stat. 457. An action by the Director General to recover upon a liability arising out of such control is an action on behalf of the United States in its governmental capacity. *Ches. & Del. Canal Co.* v. *United States,* 250 U. S. 123; *In re Tidewater Coal Exchange,* 280 Fed. 648." *Davis* v. *Corona Coal Co.,* decided by the Supreme Court May 26, 1924.

The question of priority of debts, other than taxes, owing to the United States in the distribution of bankrupt estates is one of difficulty. It is not to be decided on the general doctrine of priority of debts due the sovereign, for the Congress has undertaken to cover the whole subject by statutes. The act of 1797, R. S. 3466, provides:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having suffi-

cient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

By virtue of this statute the United States had a preference in the payment of its debts under any of the conditions mentioned in the statute—but not in a distribution which for any reason did not come within the statute. *United States* v. *Oklahoma,* 261 U. S. 253. In that case the State setting up a claim in behalf of the depositors of a bank under authority of a State statute was held to have priority over debts due the United States, on the express ground that the bank assets in the hands of a State commission did not present a condition under which the statute gave the United States priority.

The Bankruptcy Statute of 1867, R. S. 5101, provided the following order of priorities:

"In the order for a dividend, the following shall be entitled to priority, and the first paid in full in the following order:

"First. The fees, costs, and expenses of suits, and of the several proceedings in bankruptcy under this Title and for the custody of property, as herein provided.

"Second. All debts due to the United States, and all taxes and assessments under the laws thereof.

"Third. All debts due to the State in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws thereof.

"Fourth. Wages due to any operative, clerk, or house-servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy.

"Fifth. All debts due to any person, who, by the laws of the United States, are, or may be, entitled to a priority, in like manner as if the provisions of this Title had not been adopted. But nothing contained in this Title shall interfere with the assessment and collection of taxes by the authority of the United States or any State."

Thus not only taxes but all debts due the United States were given priority over all other liabilities, except costs and expenses of bankruptcy proceedings. In other words the priority given all debts due to the United States by R. S. 3466 was sanctioned and reenacted by the Bankruptcy Statute of 1867. As the court said in *Lewis, Trustee* v. *United States,* 92 U. S. 618, the statute contained no qualifications of priority of the United States, and the court could not interpolate one.

What limitation, if any, in the distribution of bankrupt assets did the subsequent Bankruptcy Act of 1898 put upon the general priority given the United States under the previous statutes? The act of 1898 was intended to cover completely all matters of adjudication, administration, discharge, priorities and distribution of assets. The statute and rules made under it supplanted and annulled all previous inconsistent statutes and rules of the courts of common law and equity. *United States Fidelity & Guaranty Company* v. *Bray,* 225 U. S. 205, 217. "The act takes into

consideration, we think, the whole range of indebtedness of the bankrupt, national, state and individual, and assigns the order of payment." *Guarantee Company* v. *Title Guaranty Company,* 224 U. S. 152, 160.

The Statute provides the following order of priority:

(*a*) The court shall order the trustee to pay all taxes legaly due to the United States, State, county, district or municipality in advance of the payment of dividends to creditors.

(*b*) Debts to have priority, except as herein provided, and to be paid in full, * * * and the order of payment shall be: (4) wages due to workmen, clerks, traveling or city salesmen or servants, which have been earned within three months before the date of the commencement of the proceedings; and (5) debts owing to any person who by laws of the States or the United States is entitled to priority.

The Congress thus took from debts due the United States, other than taxes, the priority given such debts along with taxes by the act of 1867 by leaving out of the act of 1898 other debts in providing for priority of taxes. This seems too clear for discussion; and so the court decided in *Guaranty Company* v. *Title Guaranty Company, supra.* There it was held that the act of 1797, R. S. 3466, the Bankruptcy Statute of 1867, R. S. 5101, and the Bankruptcy Statute of 1898 must be considered in pari materia; and that in bankruptcy proceedings the act of 1898 superceded section 3466, R. S. so far as the two statutes were inconsistent.

It is argued, however, that priority is given the United States next in order to debts for wages, by section 64 *b* (5) "Debts owing to any person who by the laws of the States or the United States is entitled to priority." This grade of priority is not given to the United States by virtue of R. S. 3466 unless the United States falls under the designation of "any person." The Statute itself gives this definition: "(19) 'persons' shall incude corporations except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations." Sec. 1, cl. (19), Bankruptcy Act of 1898.

The failure to include the United States and the States in the definition could not have been inadvertent. The United States and the several States of the Union are not persons and are not commonly thought of as persons, and if it had been intended that "persons" should have such a comprehensive and unusual meaning as to include them, the framers of the definition would have said so.

Again, when the Congress had already dealt with claims of the United States under the name of the United States and had deliberately limited its priority to taxes, it is hardly reasonable to attribute to the Congress an intention to deal again with the claims of the United States and include them in a provision relating to debts of "any person."

It will be noticed further that the language of (5) section 64 *b* of the act of 1898 is taken almost literally from the corresponding subdivision of the bankruptcy act of 1867, and in the absence of the expression of a contrary intention the language should be held to have the same meaning in the latter statute as in the former from which it was taken. In the act of 1867 " persons " in subdivision (5), R. S. 5101, could not have been intended to include the United States because all the debts due to the United States had been provided for and given priority over all other debts of any kind by subdivision (2) of the same section.

The record of the passage of the bankruptcy act of 1898 is significant. The bill as passed by the Senate contained the following priorities:

" Sec. 9. That the following debts shall have preference in the order named, over other debts in the distribution of the estate of the bankrupt, to wit:

"First. Debts due to servants or laborers employed by the bankrupt * * *.

"Second. Taxes or revenue due the United States.

"Third. Taxes due any State or Territory or the District of Columbia.

"Fourth. Taxes due any county. * * *."

"But none of such debts shall be recognized or paid unless duly proved and allowed as prescribed in reference to other debts and claims against the bankrupt."

All that followed the enacting clause of the Senate bill was struck out by the committee of the House, and the House bill with about eighty

amendments was substituted. The original House bill as introduced and referred to the committee contained the following as to priorities:

"Sec. 64. Debts which have priority: (*a*) Debts owing to the United States, a State, a county, a parish, or a municipality, after being proved and allowed, shall have priority only in the event and to the extent that they constitute a lien upon the property of the estate."

The committee changed this section to the form in which it was enacted in the act of 1898.

Thus it appears that after consideration of the question the Congress struck out a provision for priorities of all lien debts owing to the United States, the States and municipalities, and substituted for it a provision in the act of 1898 limiting the priority of the United States, the States, and municipalities to taxes.

As it seems to us, the analysis of the statutes and the record of the passage of the act of 1898 require the holding that the law-making power of the United States has limited its priority in bankruptcy to its claim for taxes.

This conclusion is opposed to the high authority of the Circuit Court of Appeals of the Second Circuit: *In re Tidewater Coal Exchange,* 280 Fed. 648, 650; and of the eighth circuit: *In re Western Implement Company,* 171 Fed. 81. In the view of these courts the United States and States are persons within the meaning of subdivision (5) of section 64 *b* of the Bankruptcy Act of 1898, and, therefore, entitled to priority under R. S. 3466 over general creditors after payment of wages. In the *Tidewater case* the court cited as authority for the holding *In re Hib-*

ner Oil Company, 264 Fed. 667. But the Circuit Court of Appeals of the Seventh Circuit in the latter case was called on to discuss and decide only the question whether a debt due to the Director General was a debt due to the United States: the court did not discuss the priority of a debt due to the United States, for in the opinion it is stated the priority of such a debt was conceded. Judge Rose in the District Court of Maryland expressed assent to these authorities *In re Atlantic, G. & P. S. S. Company,* 289 Fed. 146, but as the court held there was no debt to the United States the point was not really involved. The State of Minnesota was held to be "a person" within the meaning of section 64 *b* of the Bankruptcy Act of 1898 by Judge Purdy in the District Court for that State, *In re Western Implement Company,* 166 Fed. 578; and the judgment was affirmed by the Circuit Court of Appeals of the Eighth Circuit for the reasons stated by the district judge, 171 Fed. 81. The *United States* v. *National Surety Company,* 254 U. S. 73, does not decide the question. There the priority of debts due the United States over general creditors seems to have been conceded by the parties, for the court is careful to say that the sole question presented was one whether in the distribution of a bankrupt estate the United States had priority over a surety company claiming subrogation to the rights of the United States. *Marshall, Receiver,* v. *The People,* 254 U. S. 380; *United States* v. *Oklahoma,* 261 U. S. 253; *Davis, Director General,* v. *Pullen* (First Circuit), 227 Fed. 650, and *Davis, Director General* v. *Miller-Link Lumber Company,* (Fifth Circuit), 296 Fed. 649,

are not authorities for either side, for the question of the right to priority arose in receivership proceedings, and, therefore, did not involve the meaning of the provisions of section 64 of the Bankruptcy Act of 1898 fixing priority.

We find no binding authority opposed to the conclusion that the United States has no priority in bankruptcy except for taxes. On the contrary we venture to think it is supported by the reasoning and conclusion of the court in *Guarantee Company* v. *Title Guaranty Company,* 224 U. S. 152. In *Sloan Shipyards* v. *United States Fleet Corporation,* 258 U. S. 549, the majority of the court denied priority in a bankruptcy proceeding set up by the Emergency Fleet Corporation on the ground that even if the United States would be entitled to priority, the Emergency Fleet Corporation was a separate entity and its claim for priority could not be sustained. The majority intimated no opinion on the question whether a debt to the United States other than for taxes would have been entitled to priority. The Chief Justice and Justices Van Devanter and Clark dissented from the reasoning of the majority, but as to the claim to priority concurred in the result in this language used by the Chief Justice: "As to the preference claimed against a bankrupt in No. 526 by the Fleet Corporation, I concur in the conclusion of the court that it cannot be allowed under the statute as to preferences in bankruptcy, because I do not think it extends to claims of the United States except those for taxes."

For the reasons stated, and on the authority of *Guarantee Company* v. *Title Guaranty Company,*

supra, and the views expressed by the Chief Justice and Justices Van Devanter and Clark above quoted, we hold that in bankruptcy, debts due to the United States other than for taxes have no priority over general creditors.

No sound principle of public policy can be invoked in support of preference to the Federal Government and to the States over citizens in the collection of ordinary debts. On the contrary, the contractual operations of the Federal Government and of the States have become so extensive and so involved with the business of private citizens that priority to the Federal Government and to the States except for taxes would operate as an oppressive hardship on other creditors of bankrupts.

(Affirmed.)

True copy.

Teste:

[SEAL.] CLAUDE M. DEAN, *Clerk*
U. S. Circuit Court of Appeals, 4th Ct.

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Deputy Clerk.

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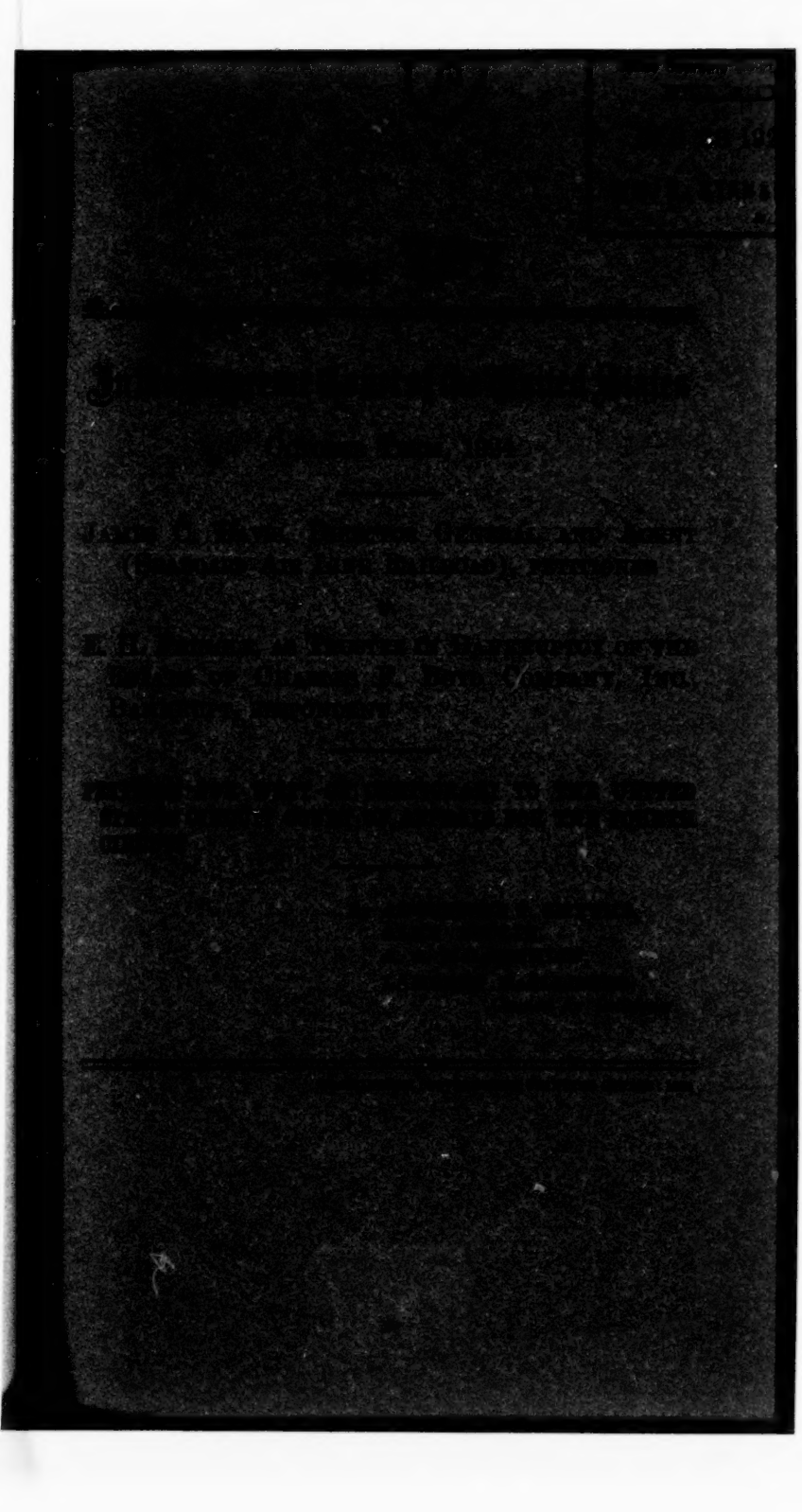

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In the Supreme Court of the United States

OCTOBER TERM, 1924.

JAMES C. DAVIS, DIRECTOR GENERAL AND AGENT (SEABOARD AIR LINE RAILROAD) PETITIONER,

v.

E. H. PRINGLE, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF CHARLES F. BOYD COMPANY, INC., BANKRUPT. RESPONDENT.

NOTICE

T. H. PRINGLE, *as Trustee in Bankruptcy of the Estate of Charles F. Boyd, Inc., Bankrupt, or* MITCHELL AND HORLBECK, AND WHALEY, BARNWELL & GRIMBALL, *his Attorneys of Record:*

This is to notify you that the petitioner will, on the 5th day of January, 1925, or as soon thereafter as counsel may be heard, present to the Supreme Court of the United States, in its court room at Washington, D. C., his motion for a writ of certiorari upon his verified petition and a copy of the entire record in this cause; and a copy of said motion, said petition and brief accompanying

same are herewith delivered to you this 5th day of December, 1924.

JAMES C. DAVIS,
Director General and Agent.
By AUGUSTINE T. SMYTHE,
A. A. MCLAUGHLIN,
ALEX KOPLIN,
LAMBERT MCALLISTER,
Counsel for Petitioner.

ACCEPTANCE OF SERVICE

The foregoing notice, and delivery of copy thereof and of motion and petition for writ of certiorari and brief are hereby acknowledged this 5th day of December, 1924.

WHALEY, BARNWELL & GRIMBALL,
MITCHELL AND HORLBECK,
Attorneys for Respondent.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

JAMES C. DAVIS, DIRECTOR GENERAL AND AGENT (SEABOARD AIR LINE RAILROAD), PETITIONER

v.

E. H. PRINGLE, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF CHARLES F. BOYD COMPANY, INC., BANKRUPT, RESPONDENT

MOTION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

Now comes James C. Davis, Director General and Agent, petitioner, by his counsel, and moves this Honorable Court that it will by certiorari, or other process, directed to the Honorable Judges of the United States Circuit Court of Appeals for the Fourth Circuit, require said Court to certify to this Court for its review and determination a certain cause in said United States Circuit Court of Appeals for the Fourth Circuit lately pending, wherein the petitioner, James C. Davis, Director General and Agent, was appellant and E. H. Pringle, as Trustee in Bankruptcy of the estate of Charles F. Boyd, Inc., Bankrupt, was appellee;

and to that end the petitioner now tenders herewith his petition and brief with a certified copy of the entire record in said cause in said United States Circuit Court of Appeals for the Fourth Circuit.

AUGUSTINE T. SMYTHE,
A. A. MCLAUGHLIN,
ALEX. KOPLIN,
LAMBERT MCALLISTER,
Counsel for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

JAMES C. DAVIS, DIRECTOR GENERAL AND AGENT (SEABOARD AIR LINE RAILROAD), PETITIONER

v.

E. H. PRINGLE, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF CHARLES F. BOYD COMPANY, INC., BANKRUPT, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of James C. Davis, Director General and Agent, hereinafter called petitioner, respectfully shows to this Honorable Court:

1. On January 15, 1924, Honorable H. A. M. Smith, United States District Judge for the Eastern District of South Carolina, in bankruptcy, affirmed the report of Lionel K. Legge, Esq., Special Referee in the matter of Charles F. Boyd, Inc., bankrupt, denying priority to a claim filed in the bankruptcy proceedings by petitioner.

The claim filed by petitioner for $2,207.43 duly itemized covered freight, storage, and demurrage earned and accruing on and after December 26, 1918, on a shipment to Charles F. Boyd & Company, Charleston, S. C.

These claims accrued in the operation during the period of Federal control of railroads by the Director General of Railroads of the properties of the Seaboard Air Line Railroad.

No question was raised as to the amount due by the bankrupt to petitioner. The sole question raised on the record was whether the claims of petitioner were entitled to priority in the distribution of the assets of the bankrupt under the provisions of Sections 3466 and 3467 of the Revised Statutes of the United States and Section 64 (b) 5 of the Bankruptcy Act of 1898 (30 Stat. 544). In the opinion confirming the Referee's order the District Court said:

> The sole question is whether the claims preferred by the petitioner, James C. Davis, Federal Agent, are entitled to priority over all other claims under the provisions of Section 3466 of the Revised Statutes. In the opinion of the Court the provisions of Section 3466 do not apply to the claims of the petitioner. That Statute contemplates debts to the United States accruing to it directly under any statutory or contractual directions. The present claims do not fall into those categories. They are claims arising only incidentally to the temporary

operation by the Government of the plant of a transportation corporation, operated by the Government in like manner as it would have been operated by the corporation itself had the Government not taken possession. The very description of the claims shows this. They are all for freight, storage, and demurrage charges on merchandise transported as shipped by private parties. The Government in possession of the Railway plant of a corporation undertook the commercial transportation of articles shipped by private persons in like manner as the same were transported by the corporation when in possession of the Railway plant and lines. For all these charges the Government Agent has a lien upon the articles transported. It was the duty of that Agent to have collected all these charges before delivery of the articles to the consignees. Having seen fit to waive that lien and deliver the articles to the consignee without collecting the charges for which he had a lien, the Agent of the Government under the circumstances of this case is not entitled to a prior lien upon the general estate of the bankrupt consignee.

2. An appeal was taken from the order of the District Court to the United States Circuit Court of Appeals for the Fourth Circuit. Upon this appeal on June 12, 1924, a hearing was had in the United States Circuit Court of Appeals for the Fourth Circuit, and on September 29, 1924, the Court rendered an opinion affirming the decision

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of the District Court. Copies of this decision and of the decision in case No. 2245 referred to therein are hereto attached as Exhibit "A."

3. The Circuit Court of Appeals for the Fourth Circuit in affirming the judgment of the lower court held, under the decision of this Court in the case of *DuPont* v. *Davis*, 264 U. S. 456, that debts due to petitioner were debts due to the United States, but held that the United States was not entitled to priority in the distribution of assets of a bankrupt estate except for taxes, and therefore affirmed the decision of the District Court.

4. The opinion of the Circuit Court of Appeals states that its conclusion is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *re Tidewater Coal Exchange*, 280 Fed. 648, and of the Circuit Court of Appeals for the Eighth Circuit in *re Western Implement Company*, 171 Fed. 81.

5. Petitioner respectfully submits that the Circuit Court of Appeals for the Fourth Circuit in affirming the judgment of the District Court for the Eastern District of South Carolina erred as a matter of law in holding.

(*a*) that the United States was not a " person " within the meaning of Section 64 (*b*) 5 of the Bankruptcy Act of 1898, and

(*b*) that the United States was not entitled to priority in bankruptcy except for taxes.

6. That the judgment of the Circuit Court of Appeals in this case is a final judgment.

7. The judgment of the Circuit Court of Appeals for the Fourth Circuit being one arising in bankruptcy is final and is reviewable by this Court only by certiorari under the provisions of the Act of September 6, 1916 (C. 448, 39 Stat. 726).

8. Certiorari should be granted in this case because the question involved is one of great public importance since the effect of the decision is to deny to the United States priority in bankruptcy except for taxes.

9. The question involved is also one which calls for a decision by the Court in order to settle and harmonize the conflicting decisions of the Circuit Court of Appeals for the Second, Eighth, and Fourth Circuits.

Wherefore, upon due consideration of this petition, of the annexed brief, and a certified copy of the record of the United States Circuit Court of Appeals for the Fourth Circuit filed herewith, petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding that Court to certify and send to this Court on a date to be designated a full and complete transcript of the record of all proceedings had in this cause to the end that the same may be reviewed and determined by this Honorable Court under said writ as provided by law. And petitioner prays that upon the final consideration of this cause and of said writ, the said judgment of the United

States Circuit Court of Appeals for the Fourth Circuit will be reversed by this Honorable Court and judgment rendered in favor of the petitioner.

Petitioner further prays for such other equitable and general relief as may appertain to this case and as may be competent for this Honorable Court to grant.

AUGUSTINE T. SMYTHE,
A. A. MCLAUGHLIN,
ALEX. KOPLIN,
LAMBERT MCALLISTER,
Counel for Petitioner.

A. A. MCLAUGHLIN,
of Counsel.

DISTRICT OF COLUMBIA,
City of Washington, to wit:

Before me, the undersigned notary public, personally appeared A. A. McLaughlin, who being duly sworn, deposes and says: That he is a member of the bar of the Supreme Court of the United States, and is of counsel for petitioner herein; that he has read the foregoing application for a writ of certiorari; and that all the facts therein stated are true and correct to the best of his knowledge and belief.

A. A. MCLAUGHLIN.

Subscribed and sworn to before me this 3rd day of December, 1924.

W. B. ROBINSON,
Notary Public, District of Columbia.

My commission expires March 23, 1925.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

JAMES C. DAVIS, DIRECTOR GENERAL AND AGENT (ATLANTIC COAST LINE RAILROAD), PETITIONER

v.

E. H. PRINGLE, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF CHARLES F. BOYD COMPANY, INC., BANKRUPT, RESPONDENT

BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI

I

THE COURT ERRED IN HOLDING THAT THE UNITED STATES WAS NOT ENTITLED TO PRIORITY EXCEPT FOR TAXES

The sole question involved in this case is whether the United States is entitled to priority in bankruptcy for debts other than taxes.

It is admitted that prior to the passage of the Bankruptcy Act of 1898 (30 Stat. 544), the United States was entitled to priority for all debts. (*Lewis, Trustee,* v. *U. S.,* 92 U. S. 618.)

The provisions of section 64 of the Bankruptcy Act of 1898, as amended, are as follows:

> (*a*) The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State,

county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

(*b*) The debts to have priority, except as herein provided, and to be paid in full out of the bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by the creditors in involuntary cases, and, where property of the bankrupt transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due to

workmen, clerks, traveling or city salesmen,* or servants, which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority.

(*c*) In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication.

Petitioner contends that under the provisions of section 64 (*b*) 5, *supra*, the United States is entitled to priority for debts other than taxes since a debt to the United States is one which "by the laws of * * * the United States is entitled to priority." Section 3466 of the Revised Statutes is as follows:

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the

> deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

It is well to bear in mind the rule of construction uniformly followed by this Court that Acts granting priority being based on public policy are to be construed liberally.

In *United States* v. *State Bank of North Carolina,* 6 Peters 29, this Court said:

> The right of priority of payment of debts due to the Government, is a prerogative of the crown well known to the common law. It is founded not so much upon any personal advantage to the sovereign, as upon motives of public policy, in order to secure an adequate revenue to sustain the public burdens and discharge the public debts. The claim of the United States, however, does not stand upon any sovereign prerogative, but is exclusively founded upon the actual provisions of their own statutes. The same policy, which governed in the case of the royal prerogative, may be clearly traced in these statutes; and as that policy has mainly a reference to the public good, there is no reason for giving to them a strict and

narrow interpretation. Like all other statutes of this nature, they ought to receive a fair and reasonable interpretation, according to the just import of their terms.

See also *U. S.* v. *Fisher,* 2 Cranch, 358.

The terms of the Acts involved are clear and we "must take the law as we find it." (*U. S.* v. *Gooding,* 12 Wheaton, 460–478.)

Section 64 (*b*) 5 contains the words "debts owing to any person who by the laws of * * * the United States is entitled to priority" and section 3466 contains the words "debts due the United States." Petitioner, therefore, contends that Revised Statutes 3466 created the priority referred to in the above quoted provisions of section 64 (*b*) 5 of the Act of 1898.

To sustain the position taken by the Circuit Court of Appeals for the Fourth Circuit this Court must hold either (*a*) that section 3466 was repealed by the passage of the Bankruptcy Act of 1898, or (*b*) that the United States is not a "person" within the meaning of section 64 (*b*) 5.

Section 3466, Revised Statutes, was not repealed by the passage of the bankruptcy act of 1898

It is elementary that a repeal will not be implied unless there is an irreconcilable conflict between the statutes (*Harford* v. *U. S.,* 8 Cranch 109; *North American Commercial Company* v. *U. S.,* 171 U. S. 110, 129), and that this Court

should so construe the statutes as to give effect to both, if possible.

In fact this Court in the case of *Guarantee Title & Trust Co.* v. *Title Guaranty & Surety Co.*, 224 U. S. 152, held that section 3466 of the Revised Statutes and the Bankruptcy Acts of 1867 and 1898 should be construed in pari materia and that the Act of 1898 superseded Revised Statutes 3466, only in so far as the two statutes were inconsistent.

That section 3466 Revised Statutes was not repealed by the Bankruptcy Act of 1898 is clearly indicated by the decisions of this Court in *U. S.* v. *National Surety Co.*, 254 U. S. 73; *Sloan Shipyards* v. *U. S. Fleet Corporation*, 258 U. S. 549, and *U. S.* v. *Oklahoma*, 261 U. S. 253.

There is no inconsistency in holding as this Court did in the *Guarantee case, supra*, that except as to taxes, debts due the United States were deferred until certain other claims such as labor had been paid, as that was clearly the intention of Congress in passing the Act of 1898.

The United States is a "person" within the meaning of section 64 (b) 5 of the bankruptcy act

That the United States is a "person" within the meaning of section 64 (*b*) 5 was decided by the Circuit Court of Appeals for the Second Circuit in *In re Tidewater Coal Exchange*, 280 Fed. 648. See also *In re Western Implement Co.*, 171 Fed. 81.

The decision of the lower Court in this case admits that the conclusion reached by it is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of *In re Tidewater Coal Exchange,* 280 Fed. 648, in which the same question was involved. In that case the Court said:

> The Circuit Court of Appeals for the Seventh Circuit, in *In re E. H. Hibner Oil Co.,* 264 Fed. 667, A. L. R. 629, declared that unpaid freight charges for shipments by railroad during the period of federal control are the property of the United States, and the claim therefore is entitled to priority in bankruptcy under section 62 b of the Bankruptcy Act (Comp. St. sec. 9648) and section 3466 of the Revised Statutes (Comp. St. Sec. 6372). The Bankruptcy Acts of 1800 (Act April 4, 1800, c. 19, sec. 62 (2 Stat. 36)), of 1841 (Act August 19, 1841, c. 9, sec. 5 (5 Stat. 444)), and of 1867 (Act March 2, 1867, c. 176, sec. 28 (14 Stat. 530)) expressly recognized the priority of debts due the United States, thus preserving in all its essential features the provision in the act of 1797, reproduced in section 3466 of the Revised Statutes relating to priorities. The Bankruptcy Act of 1898 contains no similar express provision; and, if, under that act, priority is given, it must be because of Clause 5, subd. (*b*), Sec. 64

(Comp. St. Sec. 9648), which reads as follows:

"(5) Debts owing to any person who by the laws of the States or the United States is entitled to priority."

We have no doubt that the United States is to be regarded as a person within the meaning of the clause cited, and can assert its priority as given to it under section 3466 of the Revised Statutes (Comp. St. Sec. 6372), which is reproduced in the margin 1. The priority secured to the United States is priority over all creditors. The statutory provision referred to is simply declaratory of the common-law rule which entitles a sovereign to priority over other creditors of an insolvent. *United States* v. *National Surety Co.*, 254 U. S. 73, 75, 41 Sup. Ct. 29, 65 L. Ed. 143.

The attention of this Court is directed to the fact that an application for certiorari in the last cited case was denied (*Davis* v. *Coyle*, 260 U. S. 721), and that on the application respondent suggested to this Court that in view of the dissent in the case of *Sloan Shipyards* v. *U. S. Fleet Corporation*, 258 U. S. 549, the writ of certiorari should be granted.

Petitioner submits that the decision of the lower Court in this case is not only in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the *Tidewater case, supra*, but is also in conflict with the decision of this Court in the case of *U. S.* v. *National Surety*

Company, 254 U. S. 73; *U. S.* v. *Oklahoma*, 261 U. S. 253, and with the decisions of the Circuit Court of Appeals for the Seventh and Eighth Circuits in the cases of *In re Hibner Oil Co.*, 264 Fed. 667, and *In re Western Implement Co.*, 171 Fed. 81, as well as with the decision of Judge Rose of the Circuit Court of Appeals for the Fourth Circuit in the case of *In re Atlantic G. & P. Steamship Co.*, 289 Fed. 146.

Petitioner also suggests that the decision in this case is in actual conflict with the decision of the lower Court in the case of *Lott* v. *Salisbury*, 237 Fed. 191, in which that Court said, page 203:

> The case most strongly relied upon is *Guarantee Title & Trust Co.* v. *Title Guarantee & Trust Co.*, 224 U. S. 152, 32 Sup. Ct. 457, 56 L. Ed. 706. That case holds that the United States, except for taxes due, had not in the enactment of the bankruptcy law exercised its sovereign right of providing a preference for its own claims against the bankrupt. It is conceded that the Government has such a right and frequently exercises it. In the case just referred to the Court held that the Government had, except as to taxes, put itself in the plight of an ordinary unsecured creditor, and under section 64b was postponed till certain claims, wages among others, were paid.

The attention of this Court is directed to the fact that the Circuit Courts of Appeal for the First and Fifth Circuits have held that the Direc-

tor General is entitled to priority in receivership proceedings. (*Davis* v. *Pullen,* 277 Fed. 650; *Davis* v. *Miller Link Lumber Co.,* 296 Fed. 649.)

Petitioner respectfully submits that this Court in the *Guarantee case, supra,* merely held that claims of the United States except for taxes were subordinated to labor claims by the Act of 1898, and that the dissent in the *Sloan case, supra,* can not be considered as controlling in this case.

If the position of the Circuit Court of Appeals for the Fourth Circuit in this case is correct then it was not necessary for the majority of this Court to base its decision in the *Sloan case, supra,* on the ground that a debt due the Fleet Corporation was not a debt due the United States; nor was it necessary for this Court to pass on the question involved in *U. S.* v. *National Surety Co.,* 254 U. S. 73, since a finding by the Court that the United States was not entitled to priority except for taxes would have disposed of these cases.

It is respectfully submitted, therefore, that the Circuit Court of Appeals for the Fourth Circuit erred in its conclusion in the instant case and that this Court should grant the petition for certiorari in order that the error may be corrected.

II

The questions involved are of such importance writ of certiorari should be granted

It is submitted that the writ herein should be granted since the question involved in this case is

one of great public interest, of gravity and importance (*Re Law Ow Bew*, 141 U. S. 583), and that the writ should be granted in order that the conflict in the decisions of the various courts may be corrected. (*Forsythe* v. *Hammond*, 166 U. S. 514, and *The Three Friends*, 166 U. S. 49.)

Respectfully submitted.

AUGUSTINE T. SMYTHE,
A. A. MCLAUGHLIN,
ALEX. KOPLIN,
LAMBERT MCALLISTER,
Counsel for Petitioner.

EXHIBIT A

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT

No. 2246

JAMES C. DAVIS, FEDERAL AGENT FOR CLAIMS DUE IN OPERATION OF SEABOARD AIR LINE RAILWAY COMPANY, APPELLANT

versus

E. H. PRINGLE AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF CHARLES F. BOYD COMPANY, INC., BANKRUPT, APPELLEE

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston. In Bankruptcy

(Argued June 12, 1924. Decided Sept. 29, 1924)

Before WOODS and WADDILL, Circuit Judges, and WEBB, District Judge

ALEX. KOPLIN, General Attorney for U. S. Railroad Administration, and AUGUSTINE T. SMYTHE (LAMBERT MCALLISTER on brief) for Appellant, and N. B. BARNWELL (F. H. HORLBECK; WHALEY, BARNWELL & GRIMBALL and MITCHELL & HORLBECK on brief) for Appellee, WOODS, Circuit Judge:

This appeal involves the claim of the Director General to priority of the debt due by the bank-

rupt, acruing on the line of the Seaboard Air Line Railway Company during Federal control. The questions made are discussed and decided in the opinion filed this day in No. 2245, *Davis, Federal Agent,* vs. *E. H. Pringle, Trustee.* For the reasons therein stated the decree of the District Court must be

Affirmed.

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UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT

No. 2245

JAMES C. DAVIS, FEDERAL AGENT FOR CLAIMS DUE IN OPERATION OF ATLANTIC COAST LINE RAILROAD COMPANY, APPELLANT

versus

E. H. PRINGLE AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF CHARLES F. BOYD COMPANY, INC., BANKRUPT, APPELLEE

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston. In Bankruptcy

(Argued June 12, 1924. Decided Sept. 29, 1924)
Before Woods and Waddill, Circuit Judges, and Webb, District Judge

ALEX KOPLIN, General Attorney for U. S. Railroad Administration (SIMEON HYDE; LAMBERT MCALLISTER and RUTLEDGE, HYDE, MANN & FIGG on brief), for Appellant, and N. B.

BARNWELL (F. H. HORLBECK; WHALEY, BARNWELL & GRIMBALL, and MITCHELL & HORLBECK on brief for Appellee

WOODS, *Circuit Judge:*

Charles F. Boyd Company, Inc., was adjudged bankrupt on August 20, 1920. The Director General on February 3, 1921, filed claims amounting to $2,213.70 for freight, storage, and demurrage accruing to the Atlantic Coast Line Railroad Company during Federal control. Afterwards, on February 27, 1922, the Director General by petition claimed priority over general creditors in the distribution of the assets. No point seems to have been made before the Referee or the District Court that the claim for priority was not properly set up.

If demurrage, freight, and storage charges in favor of the Director General are debts due to the United States, and as such are entitled to priority, the priority was inherent in the debts and required recognition by the court when called to its attention at any time before distribution of the assets.

The Referee reported against the claim of priority and the District Judge confirmed his report.

We are unable to agree with the Referee and the District Judge that the debts due to the Director General were not debts due to the United States of the character given priority by Section 3466 of the Revised Statutes. The Supreme Court has decided otherwise. In *DuPont* vs. *Davis,* April 7, 1924, the Court says: " In taking over and operating the railroad systems of the

country the United States did so in its sovereign capacity, as a war measure, ' under a right in the nature of eminent domain.' *North Carolina R. R. Co.* vs. *Lee,* 260 U. S. 16; *Missouri Pacific R. R. Co.* vs. *Ault,* 256 U. S. 554; *Northern Pacific R. R. Co.* vs. *North Dakota,* 250 U. S. 135; *In re Tidewater Coal Exchange,* 280 Fed. 648, 649; and it may not be held to have waived any sovereign right or privilege unless plainly so provided. Moneys and other property derived from the operation of the carriers during Federal control, as we have seen, are the property of the United States, Sec. 12, 40 Stat. 457. An action by the Director General to recover upon a liability arising out of such control is an action on behalf of the United States in its governmental capacity. *Ches. & Del. Canal Co.* vs. *United States,* 250 U. S. 123; *In re Tidewater Coal Exchange,* 280 Fed. 648." *Davis* vs. *Corona Coal Co.,* decided by the Supreme Court May 26, 1924.

The question of priority of debts, other than taxes, owing to the United States in the distribution of bankrupt estates is one of difficulty. It is not to be decided on the general doctrine of priority of debts due the sovereign, for the Congress has undertaken to cover the whole subject by statutes. The Act of 1797, R. S. 3466, provides:

" Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases

in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

By virtue of this statute the United States had a preference in the payment of its debts under any of the conditions mentioned in the statute—but not in a distribution which for any reason did not come within the statute. *United States* vs. *Oklahoma,* 261 U. S. 253. In that case the State setting up a claim in behalf of the depositors of a bank under authority of a State statute was held to have priority over debts due the United States, on the express ground that the bank assets in the hands of a State commission did not present a condition under which the statute gave the United States priority.

The Bankruptcy Statute of 1867, R. S. 5101, provided the following order of priorities:

"In the order for a dividend, the following shall be entitled to priority, and the first paid in full in the following order:

"First. The fees, costs, and expenses of suits, and of the several proceedings in bankruptcy under this Title and for the custody of property, as herein provided.

"Second. All debts due to the United States, and all taxes and assessments under the laws thereof.

"Third. All debts due to the State in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws thereof.

" Fourth. Wages due to any operative, clerk or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy.

" Fifth. All debts due to any person, who, by the laws of the United States, are, or may be, entitled to a priority, in like manner as if the provisions of this Title had not been adopted. But nothing contained in this Title shall interfere with the assessment and collection of taxes by the authority of the United States or any State."

Thus not only taxes but all debts due the United States were given priority over all other liabilities, except costs and expenses of bankruptcy proceedings. In other words, the priority given all debts due to the United States by R. S. 3466 was sanctioned and re-enacted by the Bankruptcy Statute of 1867. As the court said in *Lewis, Trustee,* vs. *United States,* 92 U. S. 618, the statute contained no qualification of priority of the United States, and the court could not interpolate one.

What limitation, if any, in the distribution of bankrupt assets did the subsequent Bankruptcy Act of 1898 put upon the general priority given the United States under the previous statutes? The Act of 1898 was intended to cover completely all matters of adjudication, administration, discharge, priorities, and distribution of assets. The Statute and rules made under it supplanted and annulled all previous inconsistent statutes and rules of the courts of common law and equity. *United States Fidelity & Guaranty Company* vs. *Bray,* 225 U. S. 205, 217. " The Act takes into consideration, we

think, the whole range of indebtedness of the bankrupt, national, State and individual, and assigns the order of payment." *Guarantee Company* vs. *Title Guaranty Company*, 224 U. S. 152, 160.

The Statute provides the following order of priority:

(*a*) The court shall order the trustee to pay all taxes legally due to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors.

(*b*) Debts to have priority, except as herein provided, and to be paid in full, * * * and the order of payment shall be: (4) wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months before the date of the commencement of the proceedings; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority.

The Congress thus took from debts due the United States, other than taxes, the priority given such debts along with taxes by the Act of 1867 by leaving out of the Act of 1898 other debts in providing for priority of taxes. This seems too clear for discussion; and so the court decided in *Guaranty Company* vs. *Title Guaranty Company, supra*. There it was held that the Act of 1797, R. S. 3466, the Bankruptcy Statute of 1867, R. S. 5101, and the Bankruptcy Statute of 1898 must be considered in pari materia; and that in bankruptcy proceedings the Act of 1898 superceded Section 3466, R. S., so far as the two statutes were inconsistent.

It is argued, however, that priority is given the United States next in order to debts for

wages, by Sec. 64-*b* (5), "Debts owing to any person who by the laws of the States or the United States is entitled to priority." This grade of priority is not given to the United States by virtue of R. S. 3466 unless the United States falls under the designation of "any person." The Statute itself gives this definition: "(19) 'persons' shall include corporations except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations." Sec. 1, cl. (19), Bankruptcy Act of 1898.

The failure to include the United States and the States in the definition could not have been inadvertant. The United States and the several States of the Union are not persons and are not commonly thought of as persons, and if it had been intended that "persons" should have such a comprehensive and unusual meaning as to include them, the framers of the definition would have said so.

Again, when the Congress had already dealt with claims of the United States under the name of the United States and had deliberately limited its priority to taxes, it is hardly reasonable to attribute to the Congress an intention to deal again with the claims of the United States and include them in provision relating to debts of " any person. "

It will be noticed further that the language of (5) Section 64-*b* of the Act of 1898 is taken al-

most literally from the corresponding sub-division of the Bankruptcy Act of 1867, and in the absence of the expression of a contrary intention the language should be held to have the same meaning in the latter statute as in the former from which it was taken. In the Act of 1867 " persons " in sub-division (5), R. S. 5101, could not have been intended to include the United States because all the debts due to the United States had been provided for and given priority over all other debts of any kind by sub-division (2) of the same Section.

The record of the passage of the Bankruptcy Act of 1898 is significant. The bill as passed by the Senate contained the following priorities:

" Sec. 9. That the following debts shall have preference in the order named, over other debts in the distribution of the estate of the bankrupt, to-wit:

" First. Debts due to servants or laborers employed by the bankrupt * * *

" Second. Taxes or revenues due the United State.

" Third. Taxes due any State or Territory or the District of Columbia.

" Fourth. Taxes due any County, * * * "

"But none of such debts shall be recognized or paid unless duly proved and allowed as prescribed in reference to other debts and claims against the bankrupt."

All that followed the enacting clause of the Senate bill was struck out by the Committee of the House, and the House bill with about eighty amendments was substituted. The original House

bill as introduced and referred to the Committee contained the following as to priorities:

"Sec. 64. Debts which have priority: (*a*) Debts owing to the United States, a State, a county, a parish, or a municipality, after being proved and allowed, shall have priority only in the event and to the extent that they constitute a lien upon the property of the estate."

The Committee changed this Section to the form in which it was enacted in the Act of 1898.

Thus it appears that after consideration of the question the Congress struck out a provision for priorities of all lien debts owing to the United States, the States and municipalities, and substituted for it a provision in the Act of 1898 limiting the priority of the United States, the States and municipalities to taxes.

As it seems to us, the analysis of the statutes and the record of the passage of the Act of 1898 require the holding that the law making power of the United States has limited its priority in bankruptcy to its claim for taxes.

This conclusion is opposed to the high authority of the Circuit Court of Appeals of the Second Circuit: *In re Tidewater Coal Exchange,* 280 Fed. 648, 650; and of the Eighth Circuit; *In re Western Implement Company,* 171 Fed. 81. In the view of these courts the United States and States are persons within the meaning of subdivision (5) of Section 64–*b* of the Bankruptcy Act of 1898, and, therefore, entitled to priority under R. S. 3466 over general creditors after payment of wages. In the *Tidewater case* the court cited as authority for the holding *In re Hibner Oil*

Company, 264 Fed. 667. But the Circuit Court of Appeals of the Seventh Circuit in the latter case was called on to discuss and decide only the question whether a debt due to the Director General was a debt due to the United States; the court did not discuss the priority of a debt due to the United States, for in the opinion it is stated the priority of such a debt was conceded. Judge Rose in the District Court of Maryland expressed assent to these authorities *In re Atlantic, G. & P. S. S. Company*, 289 Fed. 146, but as the court held there was no debt to the United States the point was not really involved. The State of Minnesota was held to be "a person" within the meaning of Section 64–*b* of the Bankruptcy Act of 1898 by Judge Purdy in the District Court for that State, *In re Western Implement Company*, 166 Fed. 578; and the judgment was affirmed by the Circuit Court of Appeals of the Eighth Circuit for the reasons stated by the District Judge, 171 Fed. 81. *The United States* v. *National Surety Company*, 254 U. S. 73, does not decide the question. There the priority of debts due the United States over general creditors seems to have been conceded by the parties, for the court is careful to say that the sole question presented was whether in the distribution of a bankrupt estate the United States has priority over a surety company claiming subrogation to the rights of the United States. *Marshall, Receiver*, vs. *The People*, 254 U. S. 380; *United States* vs. *Oklahoma*, 261 U. S. 253; *Davis, Director General*, vs. *Pullen* (First Circuit), 277 Fed. 650, and *Davis, Director General*, vs. *Miller–Link Lumber Company* (Fifth Circuit), 296 Fed. 649, are not authorities for either side, for the

question of the right to priority arose in receivership proceedings, and, therefore, did not involve the meaning of the provisions of Section 64 of the Bankruptcy Act of 1898 fixing priority.

We find no binding authority opposed to the conclusion that the United States has no priority in bankruptcy except for taxes. On the contrary we venture to think it is supported by the reasoning and conclusion of the court in *Guarantee Company* vs. *Title Guaranty Company,* 224 U. S. 152. In *Sloan Shipyards* vs. *United States Fleet Corporation,* 258 U. S. 549, the majority of the court denied priority in a bankruptcy proceeding set up by the Emergency Fleet Corporation on the ground that even if the United States would be entitled to priority, the Emergency Fleet Corporation was a separate entity and its claim for priority could not be sustained. The majority intimated no opinion on the question whether a debt to the United States other than for taxes would have been entitled to priority. The Chief Justice and Justices Van Devanter and Clark dissented from the reasoning of the majority, but as to the claim to priority concurred in the result in this language used by the Chief Justice: "And to the preference claimed against a bankrupt in No. 526 by the Fleet Corporation, I concur in the conclusion of the court that it can not be allowed under the statute as to preferences in bankruptcy, because I do not think it extends to claims of the United States except those for taxes."

For the reasons stated, and on the authority of *Guarantee Company* vs. *Title Guaranty Company, supra,* and the views expressed by the Chief

Justice and Justices Van Devanter and Clark above quoted, we hold that in bankruptcy, debts due to the United States other than for taxes have no priority over general creditors.

No sound principle of public policy can be invoked in support of preference to the Federal Government and to the States over citizens in the collection of ordinary debts. On the contrary, the contractual operations of the Federal Government and of the States have become so extensive and so involved with the business of private citizens that priority to the Federal Government and to the States except for taxes would operate as an oppressive hardship on other creditors of bankrupts.

Affirmed.

True copy,

Teste:

[SEAL] CLAUDE M. DEAN,

Clerk, U. S. Circuit Court of Appeals, 4th Ct.

Deputy Clerk.

○

Office Supreme Court
FILED
APR 18 19
WM. R. STANS

No. 1085

Supreme Court of the United States

OCTOBER TERM, 1924.

MIDDLETON S. BORLAND, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GODFREY GOLDMARK,
Counsel for Petitioner,
74 Broadway,
New York.

WM. SIEGRIST, INC., PRINTER, 9-15 MURRAY ST., N. Y.

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Supreme Court of the United States

MIDDLETON S. BORLAND, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

Notice of Application for Certiorari

To HON. JAMES M. BECK, Solicitor General,
Washington, D. C.

PLEASE TAKE NOTICE that upon a certified copy of the transcript of the record herein and upon the annexed petition and brief thereto attached, the undersigned, on behalf of the above named petitioner, will present the annexed petition for a writ of certiorari to the Supreme Court of the United States at the Capitol in the City of Washington, D. C., on Monday, April 27, 1925, at the opening of court on that day or as soon thereafter as counsel can be heard, and will ask for the relief prayed for therein and for such other and further relief in the premises as may be just.

Yours respectfully,

GODFREY GOLDMARK,
Counsel for Petitioner,
No. 74 Broadway,
New York City.

Date, April 13, 1925.

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM 1924

MIDDLETON S. BORLAND, as Trustee in bankruptcy of Knauth, Nachod & Kuhne, Petitioner, *against* UNITED STATES OF AMERICA, Respondent.	Petition for Writ of Certiorari to Circuit Court of Appeals for the Second Circuit

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Middleton S. Borland, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne, respectfully shows:——

I.

Nature of Proceeding and Decision below,

On June 15, 1923, a petition in bankruptcy was filed in the United States District Court for the Southern District of New York against Oscar L. Gubelman, *et al.*, individually and as co-partners constituting the firm of Knauth, Nachod & Kuhne, and thereafter such proceedings were had in the said District Court that your petitioner was duly elected trustee of the said individuals and of the said partnership.

In the said bankruptcy proceeding the Postmaster General of the United States, for and on behalf of the United States, filed a claim in the sum of $148,403.02,

based upon certain drafts purchased by the Post-Office Department from the bankrupt firm prior to the bankruptcy, which drafts were outstanding and unpaid when the petition was filed. Priority in the payment of said claim was demanded, upon the ground that the United States of America was entitled to the payment of its claims prior to the payment of claims of ordinary creditors, in pursuance of the provisions of Section 64 (b) (5) of the Bankruptcy Act. The Trustee objected to the claim as excessive in amount and upon the ground that the claimant was not entitled to priority. The Referee reduced the claim to the sum of $147,462.32 and allowed it as a priority claim at that amount. The order of the Referee was successively affirmed by the District Court for the Southern District of New York and by the Circuit Court of Appeals for the Second Circuit, upon authority of the decision in *Matter of Tidewater Coal Exchange,* 280 *Fed.* 648, decided by the said Circuit Court of Appeals, in which it was held that the United States of America is entitled to priority in bankruptcy for ordinary contract debts over the general creditors of the bankrupt, because it is a "person" within the meaning of Section 64 (b) (5) of the Bankruptcy Act.

II.

Conflict between Circuit Courts of Appeals.

In the Circuit Court of Appeals for the Fourth Circuit in the case of *Davis Federal Agent* vs. *Pringle Trustee* 1 F. (2d) 860, it was held that the United States of America is **not** entitled to priority in the payment of its contract debts ahead of ordinary private creditors of the bankrupt, because it is *not* a "person" within the meaning of Section 64 (b) (5) of the Bankruptcy Act. **An application for a certiorari to review the decision in that case was granted by this Court on March**

2, 1925, and the case is pending undetermined in this Court.

In the opinion in *Davis* vs. *Pringle*, it is pointed out that the decision is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the Matter of Tidewater Coal Exchange above referred to.

In *United States S. B. E. F. Corp.* vs. *Roger B. Wood, as Trustee in Bankruptcy of the Eastern Shore Shipbuilding Corporation*, decided by this court in May, 1922, 258 U. S., 549, six of the Justices of this court were of the opinion that the Fleet Corporation was not such a governmental agency that a debt due to the Fleet Corporation was a debt due to the United States and therefore said Justices held the debt of the Fleet Corporation there involved was not entilted to priority in bankruptcy and accordingly they did not pass upon the question whether a debt due the United States was entitled to such priority. The Chief Justice and Justices Vandevanter and Clarke dissented from the conclusion that the Fleet Corporation was not a governmental agency, but they concurred in the *conclusion* that the debt was not entitled to priority in bankruptcy, even if deemed due the United States because they agreed with the contention of the Trustee* that the statute as to preferences in bankruptcy did not extend to claims of the United States, except those for taxes (258 U. S., at top of page 574).

III.

Important reasons why this Court should allow the writ.

By its allowance of the writ of certiorari in *Davis* vs. *Pringle* involving the precise question here presented, this court has already determined that the question of

*Counsel for the Trustee in that case was the same as in the present case.

the government's priority is of such grave importance that it should be passed upon by this court, so that it seems unnecessary to advance further argument in support of that contention. **Your petitioner submits, however, that unless a writ of certiorari is granted *in this case*, your petitioner will not obtain any benefit from the decision of this court in *Davis* vs. *Pringle*, even if adverse to the claim of the United States, inasmuch as the decision of the Circuit Court of Appeals in the present case is final and will not be affected by any decision made by this court in the said case of *Davis* vs. *Pringle* unless this application is granted.** Your petitioner, therefore, submits that for the protection of his rights and the rights of the general creditors of the bankrupt, the writ of certiorari should be granted in this case, to the end that this case may be heard together with the said case of *Davis* vs. *Pringle* in this court.

Your petitioner further shows that the said case of *Davis* vs. *Pringle* involves a claim for the sum of $2,213.70, whereas the claim in the present case is for the sum of $147,462.32.

WHEREFORE because of the gravity and importance of the question presented and the necessity of avoiding conflict between the Circuit Courts of Appeals and in order to enable your petitioner to obtain any benefit from a decision adverse to the Government in the said case of *Davis* vs. *Pringle* involving the question here presented and in which a writ of certiorari has already been granted by this court, your petitioner respectfully prays that a writ of certiorari may be issued out and under the seal of this court, directed to the Judges of the United States Circuit Court of Appeals for the Second Circuit, demanding them to certify and send to this court a transcript of the record of the proceedings in this case, to the end that the decree of said court may be reviewed

with the said decree in *Davis* vs. *Pringle,* and that your petitioner may have such other and further relief in the premises as to this court may seem appropriate.

MIDDLETON S. BORLAND,
as Trustee in Bankruptcy of Knauth, Nachod & Kuhne.

STATE OF NEW YORK, }
County of New York, } ss.:

MIDDLETON S. BORLAND, being duly sworn, deposes and says as follows:

I am the Trustee in Bankruptcy of Knauth, Nachod & Kuhne. I have read the foregoing petition and the same is true to the best of my knowledge, information and belief.

MIDDLETON S. BORLAND.

Sworn to before me this
13th day of April, 1925.

JOHN E. McGUIRK,
Notary Public, Bronx County,
Certificate filed New York County.

Certificate of Counsel.

I hereby certify that I have examined the foregoing petition and in my opinion it is well founded and the case is one in which the prayer of the petitioner should be granted by this court.

GODFREY GOLDMARK,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

MIDDLETON S. BORLAND, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Question Involved.

The question involved is whether the United States is a "person" within the meaning of Section 64 (b) (5) of the Bankruptcy Act, which Section is as follows:—

> (a) The court shall order the trustee to pay all *taxes* legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.
>
> (b) The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of

the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery; (3) the cost of administration, including the fees and milage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the Court may allow; (4) wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) *debts owing to any person who by the laws of the States or the United States is entitled to priority.*

POINT I.

The United States obtains its priority, if any, from the Bankruptcy Act of 1898, and is bound by its provisions.

Under the Act of 1867, it was held in the *Lewis* case, 92 U. S., 618, that the priority of the United States arose under an Act of 1797, now Revised Statutes 3466, and that the priority created by the Bankruptcy Act was simply a precaution to reaffirm the priority of the Government in bankruptcy proceedings.

Under the Act of 1898, however, it has been held that the United States is bound by the provisions of the Bankruptcy Act, and that whatever priority it has for the payment of its ordinary debts, must be created by that Act. It was for that reason that the Circuit Court of Appeals held in *U. S.* vs. *Wood* as trustee, 290 Fed. 109, and that

this Court concurred (263 U. S., 680) that the plenary suit in equity to charge the assets for a debt due the United States could not be maintained by virtue of R. S. 3466, although it could be maintained under the Act of 1867.

Therefore, there remains simply the question whether or not the Bankruptcy Act of 1898 does in fact create a priority in favor of the United States for ordinary debts. Concededly, it does not create such a priority in so many words. The narrow question is whether under the provisions of 64b(5) the United States itself is a "person," so that it is entitled to priority, because such priority is created by a "law of the United States," to wit: R. S. 3466.

POINT II.

The Bankruptcy Act of 1898 contains no express grant of priority to the United States eo nomine for an ordinary indebtedness, and the history of that act and of the earlier Bankruptcy Acts shows that the word "person" as used in Section 64 of the present act includes only private creditors and was not intended to include the United States itself; and therefore that R. S. 3466 is not incorporated into the act by reference.

It is impossible to construe the Act of 1898 without a consideration of the earlier Bankruptcy Acts and the history of the bills which led up to the enactment of the present Act. It is this procedure which this Court followed in the *Title Guarantee* case, 224 U. S. 152 and in *Schall* vs. *Camors*, 251 U. S. at 250.

The Bankruptcy Act of 1800.

Prior to 1800 Congress had not exercised its delegated power to pass a bankruptcy statute, but it had provided by Section 5 of the Act of March 3, 1797 (1 Stat. 512) as follows:

> "And be it further enacted, that where any revenue officer, *or other person* hereafter becoming indebted to the United States, by bond *or otherwise*, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend, as well to cases in which a debtor not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor, shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed."

The act of bankruptcy therein referred to evidently referred to acts under State statutes.

The first Bankruptcy Act passed in 1800 provided (2 Stat. 19, 36):

> "And be it further enacted, That nothing contained in this law shall in any manner affect the right of preference to prior satisfaction of debts due to the United States as secured or provided by any law heretofore passed, nor shall be construed to lessen or impair any right to, or security for, money due to the United States or to any of them."

This provision was construed in *United States* vs. *Fisher*, 2 Cranch, 358, where the Court held that the purpose of the foregoing provision was simply to continue

in a Federal bankruptcy providing the priority which had been granted to the United States by the Statute of 1797. Thus the Act of 1800 did not itself *create* a priority for the United States, nor did it create any priority for private creditors who might be accorded preference under the laws of the United States or of the States.

This Act, 5 Stat. 440, 445, provides:

The Bankruptcy Act of 1841.

"SEC. 5. And be it further enacted, That all creditors coming and proving their debts under such bankruptcy, in the manner hereinafter prescribed, the same being bona fide debts, shall be entitled to share in the bankrupt's property and effects, pro rata, without any priority or preference whatsoever, except only for debts due by such bankrupt to the United States, and for all debt due by him to **persons who, by the laws of the United States, have a preference,** in consequence of having paid monies as his sureties, which shall be first paid out of the assets; and any person who shall have performed any labor as an operative in the service of any bankrupt shall be entitled to receive the full amount of the wages due to him for such labor, not exceeding twenty-five dollars. Provided, That such labor shall have been performed within six months next before the bankruptcy of his employer." * * *

In this act is found for the first time the phrase which s the basis of the Government's claim.

This Act, it will be noted, provided that the creditors roving their debts should be entitled to no priority except (1) debts due to the United States, (2) debts due to ersons who by the laws of the United States were entitled to a preference in consequence of having paid noney as sureties and (3) to wage earners for amounts ot exceeding $25.00. In other words, there priority was xpressly granted to the United States for its debts, and

in addition priority was granted to persons who under the laws of the United States were subrogated to the rights of the United States under the Statute of 1797, now R. S. 3468, and also to a limited class of wage earners. It is entirely clear, therefore, that under this Act of 1841, the word "persons" did not include the United States itself. It is also to be noted that there was no priority granted to private creditors of the bankrupt other than sureties, even if granted priority under the laws of the United States or of the States. This provision of the Act does not seem to have been interpreted and the Act itself was repealed in 1843.

The Bankruptcy Act of 1867.

This Act (March 2, 1867), 14 Stat. 530, C. 176, indicates clearly that Congress had in mind the distinction between ordinary debts due to the United States, moneys due as taxes and assessments, claims of wage earners, and also debts due to all persons, i. e., private creditors, who by the laws of the United States were or might be entitled to priority. In Section 28 of that Act it was provided as follows:

> "In the order for a dividend, under this section, the following claims shall be entitled to priority or preference, and to be first paid in full in the following order:
>
> First.—The fees, costs and expenses of suits, and the several proceedings in bankruptcy under this act, and for the custody of property, as herein provided.
>
> Second.—All *debts* due to the *United States, and all taxes* and assessments under the laws thereof.
>
> Third.—All debts due to the State in which the proceedings in bankruptcy are pending, and all

taxes and assessments made under the laws of such state.

FOURTH.—Wages due to any operative, clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy.

FIFTH.—All debts due to any *persons*, who by the laws of the United States, are or may be entitled to a priority or preference, in like manner as if this act had not been passed; always provided, that nothing contained in this act shall interfere with the assessment and collection of taxes by the authority of the United States or of any State."

Here is a clear recognition of the distinction between debts and taxes due to the United States and debts due to "persons" who by the laws of the United States were or might be entitled to priority. It needs no argument to show that in view of the fact that there was an express provision with respect to *debts* (other than taxes) due to the United States in subdivision 2nd, that the word "persons" in sub-division 5 was not intended to include the United States itself.

In *Lewis* vs. *United States*, 92 U. S., 618, the Supreme Court considered the relation between the above provision of the Act of 1867 and the Statute of 1797, and the Court said, with respect to the priority of the United States itself, after quoting Section 28 of the Act of 1867:

> "The clause above quoted is in *pari materia* with the several acts giving priority of payment to the United States, and was doubtless put in to recognize and reaffirm the rights which those statutes give, and to exclude the possibility of a different conclusion."

It is clear, therefore, that under the Act of 1867 Congress, as it had done in each of the prior Acts, expressly reaffirmed the priority of the United States over all indebtedness, and made applicable to bankruptcy proceedings the priority created by the Statute of 1797. In addition it extended and created priority in favor of certain "persons," that is to say, in favor of certain private creditors, whose claims were thus preferred after the debts of the United States and certain other indebtedness.

Certainly in the light of the continued policy of Congress in these three bankruptcy Acts specifically to reaffirm or recreate in bankruptcy the priority of the United States over the ordinary debts and separately to provide for the priority of certain "persons," it cannot be presumed that when Congress copied into the Act of 1898 the provision granting a priority to certain "persons" and deliberately omitted in the final enactment of the statute a priority for the *debts* of the United States, expressly limiting the priority to taxes, that it was intended by *mere implication to extend* the meaning of the word "persons" copied from the earlier acts to include not only private creditors but also the United States itself.

An analysis of the Act of 1898 shows the following:

Section 17 provides:

> "(*a*) A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as (1) are due as a *tax* levied by the United States, the State, county, district or municipality in which he resides."

Section 57J provides as follows:

> "*Debts* owing to the United States, a State, a County, a district or a municipality as a penalty or forfeiture shall not be *allowed*, except for the

amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law."

In the foregoing provisions is found a distinct recognition of the existence of three classes of claims of the United States:

(A) Taxes;

(B) Debts owing as penalties;

(C) Debts generally.

Furthermore, debts owing to the United States are referred to in Section 57 and debts due any *person* entitled to preference by the laws of the United States are referred to in Section 64.

Having thus clearly indicated an intention that all classes of debts due the United States in bankruptcy are within the purview of and subject to the provisions of the Act, Congress in Section 64 provided for certain priorities.

In that Section again there is a clear distinction between taxes and debts. The order of priority is provided for as follows:

(*a*) All *taxes* due and owing to the *United States*, the State and political subdivision.

(*b*) Cost to preserve the estate.

(*c*) Filing fees and expenses of creditors who have recovered assets.

(*d*) Cost of administration.

(*e*) Wages.

(*f*) *Debts* owing to any *person* who by the laws of the States or the United States is entitled to priority.

Reading the Act alone, it appears that Congress had in mind the various classes of debts due to the United States and deliberately determined just what indebtedness of the bankrupt should be entitled to prior payment and that it concluded that ordinary debts due the United States should not be given such a priority and should be allowed and discharged as private debts.

It is apparent, therefore, that the whole claim to priority is bottomed upon the proposition that despite these explicit provisions and references to the United States, Congress by implication intended to *extend the meaning of the word "persons" to include the United States, although the same phrase in earlier acts clearly referred solely to private creditors, and that that extension of meaning was effectuated solely by means of the ambiguous definitions of terms used in the Act.*

It now will be shown that the history of the Act of 1898 negatives any such intention and affirmatively shows that the intention was to the contrary.

History of the Act of 1898.

The history of the Act in Congress substantiates this view:

For some years prior to 1898, there was an agitation for the enactment of the Bankruptcy Law. A bill was drawn by Judge Torrey, which was introduced in the House in the early '90s and considered at successive sessions of Congress. Finally Speaker Henderson introduced in the House (H. R., 8110) a bill, which embodied the essential provisions of the Torrey bill, and having been referred to the Judiciary Committee, it was favorably reported by that Committee on April 13, 1896 (Cong. Record, 54 Cong., 1 Sess., p. 3931).

That bill provided:

Section 64: *Debts which have Priority.*

(*a*) *Debts owing to the United States,* a State, a county, a parish, or a municipality, after being proved and allowed, shall have priority **only in the event and to the extent that they constitute a lien upon the property of the estate.**

(*b*) The debts to have priority except as herein provided, and to be paid in full out of bankrupt estates and the order of payment shall be
* * *

5. Debts owing to any *person* who by the laws of the States or the United States is entitled to priority."

Clearly under this bill there was no intention to include the United States in the word "persons" for there was an express provision granting priority to "debts owing to the United States," limiting that priority, however, to those debts which constituted a lien. This priority was narrower than the priority eventually granted (for taxes of the United States only became a lien after they had been assessed and a demand made therefor. Revised Statutes, Section 3186, whereas under the Act as passed, all taxes are granted priority whether or not they have become a lien and similar state statutes existed).

In April, 1897, a similar bill was reported by the Senate Judiciary Committee. The bill, as reported, contained the following (Cong. Record, 55 Congress, 1st Session, pp. 601-609):

Section 65: Debts which have priority

(*a*) *Debts* owing to the United States, a State, County, Parish, being a political corporation, District, or Municipality, after being allowed, shall have priority *only in the event and to the extent that they constitute a lien upon the property of the estate.*

(*b*) 1, 2, 3 and 4 are like the present Section 64). "5. Debts owing to any person which by the laws of the United States, or a State are entitled to priority."

The bill was not enacted as reported but Senator Nelson on April 22, 1897, offered a substitute bill which passed the Senate on that day. That bill provided as follows (Cong. Rec., 55 Congress, 1st Session, p. 800):

"SEC. 9. That the following debts shall have preference in the order named over other debts in the distribution of the estate of the bankrupt, to wit:

FIRST—Debts due to servants and laborers employed by the bankrupt for labor performed or services rendered within six months prior to the filing of said petition.

SECOND.—*Taxes* or *revenues* due the United States.

THIRD.—Taxes due any State or Territory or the District of Columbia.

FOURTH.—Taxes due any county, parish, etc."

This bill, it will be noted, extends the priority from debts, which are a lien, to all taxes, **but does not purport to create a priority for ordinary debts.**

That bill was referred to the House Committee and that body eventually reported back *another bill* (Congressional Record, 55th Congress, 2nd Session, pages 1777, 1784). That bill contained the provision as to priorities now contained in the act.

The bill passed the House and went to the Senate. Thereafter a conference committee agreed upon a bill which contained the same provision as in the House bill (Senate Document 294, 55th Cong. 2nd Session) and this bill became a law.

Thus it is apparent that while the bills as originally introduced created a priority for "debts" which were a lien, there was substituted for this provision in the Act as finally enacted a direction to pay taxes, but there was not inserted any provision creating a priority in the United States for ordinary debts or reaffirming the priority under the Statute of 1797 (now Revised Statutes 3466) as was done in all the prior Acts.

Summary of Historical Review.

From the foregoing discussion the following appears:

(*a*) The Act of 1800 specifically preserved the priority created by the Statute of 1797 and created no priority for persons, i. e., private creditors.

(*b*) The Act of 1841 again preserved or created a priority for debts due the United States *and in addition* created a priority for two classes of "persons" i. e., for private creditors who had priority under the laws of the United States as sureties for debtors of the United States, and for wage earners.

(*c*) The Act of 1867 "reaffirmed" in bankruptcy the priority granted by the Statute of 1797, and in addition *extended* the priority in bankruptcy to *all* persons, i. e., private creditors as were or might be entitled to priority under the laws of the United States thus including not only sureties but priority claimants under the laws of the District of Columbia and of the territories and any persons to whom priority might be granted thereafter by any Federal statute.

(*d*) The bills in Congress leading up to the Act of 1898 preferred "Debts owing to the United States," but only in the event and to the extent that they constituted a lien and by separate provision continued and extended the priority in bankruptcy to persons, i. e., private creditors

so as to include creditors entitled to priority not only under the laws of the United States but also under the laws of the States. This Act also discharges debts due the United States other than taxes and provides that debts for penalties are to be allowed only for the actual damage sustained.

In *Guarantee Co.* vs. *Title Guaranty Co.*, 224 U. S., 152, the Supreme Court said:

> "And we cannot say that it was inadvertent. The act takes into consideration, we think, the whole range of indebtedness of the bankrupt, national, state and individual, and assigns the order of payment."

As these changes were not inadvertent and the Act takes into consideration the whole range of indebtedness of the bankrupt, national, state and individual, and assigns the order of payment, and as ordinary debts are discharged the intent of Congress is clear to curtail the rights of the Government and upon ordinary debts to place the Government upon the plane of an ordinary citizen. If the intention had been to give it priority for ordinary debts as distinguished from taxes, *it is not conceivable* that the draftsmen of the Torrey bill and the subsequent bills which led to the enactment of the Act of 1898 would have deliberately removed from the Act of 1867 the express priority for debts due the United States contained in Section 28 of the Act of 1867, and first would have limited such priority to "debts" which are a lien and finally to taxes. *If the intention was to continue the priority the language of the Act of* 1867 *would not have been eliminated and so important a right would not have been allowed to rest upon ambiguous definitions and implications.*

The draftsmen of the Act of 1898 were, of course, familiar with the decision in the *Lewis* case, 92 U. S., 618, which held that the express priority for debts was inserted in the Act of 1867 to recognize and reaffirm the

rights created by the Statue of 1797 "*and to exclude the possibility of a different conclusion.*" Knowing, therefore, that there was this possibility of a "different conclusion," what possible reason could there be for Congress deliberately to fail to recognize or create the priority for the United States *in so many words* as was done in the 1867 Act. Why should the express priority of the Act of 1867 have been eliminated unless Congress intended to eliminate the right itself.

It now will be shown that the definitions contained in the act and the application of the provisions of Section 64 do not forbid the adoption of the foregoing conclusion as suggested by the opinion in the *Tidewater* case.

POINT III.

A. The Act of 1898 despite the definitions therein contained is not free from ambiguity as to the status of debts due the United States and therefore the prior acts and the history of the Act of 1898 can be resorted to for the purpose of resolving the ambiguity.

Section 1a of the Bankruptcy Act provides as follows:

> "The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows * * *
>
> (6) 'Corporations' shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under the laws making the capital subscribed alone responsible for the debts of the association.
>
> (19) 'Persons' shall include corporations, ex-

> cept where otherwise specified, and officers, partnerships, and women, and when used with refereene to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers and members of the board of directors or trustees, or other similar controlling bodies of corporations."

Assuming that the United States is a corporation sovereign, it is submitted that the definition of corporations above set forth was not intended to include the United States, but by its very language was limited to private corporations, joint stock companies, limited partnerships or other partnership associations organized under the laws of the various states in all of which there was a right of succession and in some of which a limited liability of the members as contrasted with powers and privileges of individuals and partnerships. Congress, of course, realized that the laws of the various states differed in their terminology with respect to organizations which were not strictly private corporations and not the ordinary partnership and therefore used the language quoted to cover those classes of organizations of which the essential features were continuity and in some limited liability. In view of the fact that throughout the Act the states and the United States are referred to in *haec verba* it is not believable that Congress would have failed specifically to include the United States and the States in so many words if it had intended that they or either of them should be included within the definitions just as certain partnership associations were thus included in the definition. It is not believable that Congress would have left the rights of the United States or the States to be asserted by mere implication. Certainly it is a peculiar "judicial process" which leads to the conclusion that these definitions *without any doubt* include the United States and therefore eliminates the pos-

sibility of examining the history of the legislation and the Act as a whole as an aid in construing what must certainly be considered at least an ambiguity as to the scope of the definition and as to whether the definition is inconsistent with the context. As above indicated in numerous places throughout the Act, Congress has referred to the United States by name and specifically in Section 64 has created a priority for the United States and the States for taxes. Consequently the failure of Congress in so many words to create a priority for ordinary debts in the very section which specifically creates such a priority for taxes is most persuasive evidence of Congressional intention that the priority for debts should not exist. And yet the Referee finds not the slightest ambiguity or doubt and by a most technical application of definitions and without regard to the context of the very section, he has determined that no reference can be made to the prior Act and their interpretation by the Courts and to the history of the particular Act under construction.

An examination of the Act as a whole shows the use of the word "person" time and again under circumstances, where it is entirely clear that no sovereign corporation was intended to be included and where the intention was to include only natural persons, strictly private corporations and those bodies which possessed some of the attributes of a partnership and some of a private corporation. For example:

Section 2, subdivision 16 provides that the court of bankruptcy has power to punish "persons" for contempt.

Section 3 (a) provides what acts of bankruptcy by a "person" shall consist of.

Section 4 of the original Act of 1898 (30 Stat. 544) provided that any person, except a corporation, could become a voluntary bankrupt, and Section 4 (b) in the

original Act provided that any natural person, except certain specified individuals and certain corporations engaged in certain lines of business, might be adjudged an involuntary bankrupt, and of course here there would be included not only a strictly private corporation, but also in pursuance of the definition bodies engaged in those lines of business having the attributes of a private corporation (such as joint stock associations and partnership associations).

The present act as amended by the Acts of 1903 and 1910 extends the right to file a voluntary petition to any person *except* certain classes of corporations and extends the class of corporations against which petitions may be filed [as the United States and a State are not specifically excluded, under the reasoning of the Referee a State or the United States being corporations not within the excepted class could file voluntary petitions].

Section 16 (a) provides that the liability of a "person" who is a co-debtor with or guarantor for the bankrupt shall not be discharged.

Section 20 (b) provides any person conscientiously opposed to the taking of an oath may in lieu thereof affirm.

Section 29 in all its subdivisions provides that a "person" may be punished for offenses under the Act.

In the light of the foregoing, can it be seriously argued that the court is bound to hold that there is no possible room for construction; that "persons" in Section 64 *without doubt includes the United States and that it must shut its eyes to the history of the past and present acts in ascertaining the true intent of Congress in continuing the priority for "persons" which originated in the Act of* 1841.

In construing definitions and their application, the courts cannot close their eyes to the fact that the use of definitions in statutes is a comparatively modern inno-

vation and frequently leads to confusion because the definitions give a non-natural sense to words which are afterwards used in a natural sense without regard to the distinction. In the absence of definitions which specifically include the United States or a state within the meaning of the word "person," the court must be free to examine the history of the legislation in order to ascertain the true legislative intent.

POINT IV.

A failure of Congress to create a priority for ordinary debts due the United States is in accordance with an enlightened and desirable public policy and the Courts should not be astute to spell out an intent to the contrary. The losses which the government sustains in excess of its pro rata share of the assets should not be borne by the other creditors of the bankrupt but by all the people.

POINT V.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GODFREY GOLDMARK,
Counsel for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1924

JAMES C. DAVIS, DIRECTOR GENERAL AND Agent (Atlantic Coast Line), petitioner
v.
E. H. PRINGLE, AS TRUSTEE IN BANKRUPTCY of the Estate of Charles F. Boyd Company, Inc., Bankrupt, respondent — No. 786

JAMES C. DAVIS, DIRECTOR GENERAL AND Agent (Seaboard Air Line), petitioner
v.
E. H. PRINGLE, AS TRUSTEE IN BANKRUPTCY of the Estate of Charles F. Boyd Company, Inc., Bankrupt, respondent — No. 787

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

STATEMENT

These writs of certiorari bring up for review decisions of the Circuit Court of Appeals for the Fourth Circuit, affirming two orders of the United

States District Court of the Eastern District of South Carolina which denied petitioner's claims for priority in a bankruptcy proceeding.

Claims for freight, storage, demurrage, and war tax, aggregating $4,421.13, arising out of the operation of the Seaboard Air Line and Atlantic Coast Line during Federal control, were filed in the bankruptcy proceeding of Charles F. Boyd Company Inc., bankrupt, by the petitioner, the Director General of Railroads. The merchandise, after having been held in storage for one hundred and fifty-eight days, had been sold by the Director General of Railroads, and the proceeds of the sale credited on the claims. (R. pp. 11–13.)

The referee reported against the claim of priority, and the United States District Judge confirmed the report on the ground that the claims were due to the Director General of Railroads and not to the United States. The Circuit Court of Appeals rejected the opinions of the referee and the district court, but affirmed the orders with a decision that the United States was not entitled to priority except for taxes.

QUESTIONS PRESENTED

The sole questions presented are:

(A) Whether the United States is entitled to priority in bankruptcy proceedings for debts other than taxes; and

(B) If the first question is answered in the affirmative, whether the petitioner has such priority.

A

THE FIRST QUESTION

APPLICABLE STATUTES

Section 3466 of the Revised Statutes

Section 3466 of the Revised Statutes (Compiled Statutes of 1916, Section 6372) provides as follows:

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

The Bankruptcy Act of 1898

Section 64 of the Bankruptcy Act, 30 Stat. 563, as amended by 32 Stat. 800 and 34 Stat. 267 (Comp. Stat. § 9648), provides:

> Debts which have priority.—*a* The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of

dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

b The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three

months before the date of commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority.

BRIEF OF ARGUMENT

A. For the purposes of this discussion the petitioner concedes that the right of the United States to priority of payment is a creature of statute; that the Bankruptcy Act of 1898, unlike prior bankruptcy acts, does contain certain provisions binding upon the United States; that the Bankruptcy Act of 1898 annulled all previous inconsistent statutory provisions; that in so far as Section 3466, R. S., prescribes a different order of priority from that prescribed by Section 64 of the Bankruptcy Act, the former statute must yield to the latter; that the Bankruptcy Act takes into consideration the whole range of the bankrupt's debts and assigns the order of payment; and that under the Bankruptcy Act the jurisdiction of the bankruptcy courts in all proceedings in bankruptcy is intended to be exclusive.

B. The petitioner contends:

I. When the Bankruptcy Act of 1898 was adopted the United States had priority for all debts. The question, therefore, is not whether the Bankruptcy Act *gave* the Government priority for debts other than taxes, but whether it *destroyed* a priority which the Government already possessed.

(*a*) When the Act of 1898 became a law the United States, for more than a century, had been and was then entitled to priority of payment from the assets of insolvents, under Section 3466, R. S.

(*b*) The Government's right of priority under Section 3466, R. S., was an extensive one.

(*c*) Prior bankruptcy acts had left the Government's right of priority undisturbed and unimpaired.

(*d*) The Government's priority, therefore, required no re-creation and no reenactment in the Act of 1898. For it to continue indefinitely, it was only necessary that it should be left alone.

(*e*) If the Act of 1898 destroyed the Government's priority for debts other than taxes, it did it so subtly that both the bench and the bar for a generation have been unaware of it.

(*f*) With the exception of the court below, the courts have uniformly recognized the Government's priority for debts as well as taxes in bankruptcy.

II. Since Section 3466, R. S., was not expressly repealed by the Bankruptcy Act of 1898, the Government's right of priority could have been destroyed only by such inconsistency or repugnancy between the two statutes as to make it impossible to give effect to both of them.

III. Since it is possible to give effect to both statutes by construing the term "person" as used in Section 64 b (5) of the Bankruptcy Act to include the United States, that construction must be adopted.

(*a*) The Bankruptcy Act is fairly susceptible of no other construction than that Congress intended, not to destroy the Government's priority, but merely to change its order of payment.

(*b*) Construed in that manner the Bankruptcy Act and Section 3466, R. S., become harmonious and full effect is given to both.

(*c*) Section 64 of the Bankruptcy Act is not a self-sufficient code of priorities, but it expressly incorporates within itself all relevant Federal and State laws, including Section 3466, R. S.

IV. The United States is a person within the meaning of Section 64 b (5) of the Bankruptcy Act.

(*a*) The Bankruptcy Act defines "corporations" as *all bodies* having *any* of the powers and privileges of private corporations not possessed by individuals or partnerships, and provides that "persons" shall include corporations. The definition is not limited to private corporations.

(*b*) The United States and the States are corporations.

(*c*) As a corporation the United States possesses some of the powers and privileges of private corporations.

(*d*) Again, this court has frequently classified the United States and the States as persons.

(*e*) Since the concept of the United States and the States both as corporations and as persons was a familiar one long prior to the enactment of the Bankruptcy Act, the failure to include them *eo*

nomine within the statutory definitions of "corporations" and "persons" is without significance.

(*f*) In other sections of the Bankruptcy Act the United States and the States are plainly included within the word "persons."

(*g*) In other sections of the Bankruptcy Act the United States and the States are plainly included within personal pronouns.

(*h*) Throughout the Bankruptcy Act the United States and the States are obviously included within other generic terms, such as "creditors," "claimants," and "parties," in accordance with the intention of the draftsman to avoid repetition whenever possible.

(*i*) The United States and the States, as distinguished from their laws, courts, territories, etc., are expressly mentioned in the Act only in six instances, in none of which would it have been possible to include them within generic terms.

(*j*) Thus the Bankruptcy Act contains within itself the guides to its own construction and there is no occasion to seek extraneous aids to construction in the form of prior bankruptcy acts or the legislative history of the present Act.

(*k*) If the United States is not a "person" within the meaning of Section 64 b (5), neither are the States. It may be doubted that Congress intended by such indirection to deprive the States of rights which they had so long possessed.

(*l*) It would seem that the question is no longer an open one in this court.

V. Neither the phraseology of the Act of 1898, considered in connection with that of prior bankruptcy acts, nor the legislative history of that Act discloses any purpose to destroy the priority of the United States for debts.

(*a*) The differences in phraseology between the priority clauses of previous bankruptcy acts and that of the Act of 1898 is sufficiently explained by the legislative purpose to assign a different order to the priority of the United States and the States for their debts.

(*b*) The failure of Congress to recognize the priority of the United States in the Act of 1898 in the identical terms in which that recognition was couched in prior acts did not destroy that priority.

(*c*) The word "person" as used in the priority clause of the Act of 1898 is not restricted in its application by its context as it was in the Act of 1867.

(*d*) In the light of the decisions of this court and of the definitions contained in the Act of 1898, it is impossible to contend that words used in the Act of 1898 in one context should be given the same application which they had when used in a different context in the Act of 1867.

(*e*) Nor does the legislative history of the Act of 1898 disclose any intention to deprive the United States of priority for debts in bankruptcy proceedings.

VI. Congress having decreed it to be the national policy that the Government should have priority in bankruptcy proceedings for both debts and

taxes, the wisdom of the policy is not open to question in the courts. Moreover, the policy declared by Congress accords with the dictates of a sound public policy.

(*a*) The wisdom of the policy is a question for legislative and not for judicial consideration.

(*b*) It is unbelievable that Congress intended to reverse the policy of a century in the present Bankruptcy Act in a manner so difficult of detection that for almost a generation the bench and bar have been unaware of the legislative purpose.

(*c*) A sound public policy does not require that the Government's loss be shifted from the general creditors of a bankrupt to the taxpayers. There is no greater reason why general creditors should bear the loss resulting from the Government's inability to collect its taxes than that resulting from its inability to collect other debts.

(*d*) With knowledge of the construction placed by the Federal courts upon Section 64 of the Bankruptcy Act, Congress has amended that Act nine times, but has not altered the provisions of Section 64 b (5).

PRELIMINARY CONSIDERATIONS

In order to reduce the problem to its ultimate terms, it may be conceded for the purposes of this discussion:

(1) That the right of the United States to priority of payment from the assets of insolvents does not inhere in its sovereignty, but is a creature of

statutes which embody an ancient rule of the common law whereby the sovereign has priority over other creditors of an insolvent. *United States* v. *Fisher,* 2 Cranch. 358; *United States* v. *State Bank of North Carolina,* 6 Pet. 29, 35; *United States* v. *National Surety Company,* 254 U. S. 73, 75. However, the question remains, does the Bankruptcy Act of 1898 repeal Section 3466 R. S. in whole or in part?

(2) That the Bankruptcy Act of 1898, unlike prior bankruptcy acts (*Lewis, Trustee,* v. *United States,* 92 U. S. 618), does contain certain provisions binding upon the United States. *Guarantee Company* v. *Title Guaranty Company,* 224 U. S. 152. However, the question remains, what provisions are binding upon the United States, and whether those provisions are so repugnant to Section 3466 R. S. as to destroy the Government's right to priority for debts other than taxes.

(3) That the Bankruptcy Act of 1898 annulled all previous inconsistent statutory provisions. However, the question remains, whether and to what extent the Bankruptcy Act of 1898 and Section 3466 R. S. are inconsistent.

(4) That in so far as Section 3466 R. S. prescribes a different order of priority from that provided by Section 64 of the Bankruptcy Act of 1898, the former must yield to the latter. However, the question remains, whether the Bankruptcy Act of 1898 does more than change the order of the Government's priority.

(5) That the Bankruptcy Act of 1898 takes into consideration the whole range of indebtedness of the bankrupt—national, state, and individual—and assigns the order of payment. *Guarantee Company* v. *Title Guaranty Company, supra.* However, the question remains, what order of priority was assigned to debts other than taxes due the Government?

(6) That under the Bankruptcy Act of 1898 the jurisdiction of the bankruptcy courts in all proceedings in bankruptcy is intended to be exclusive, and that such proceedings include, among others, all matters of administration, such as the allowance, rejection, and reconsideration of claims, the reduction of the estates to money and its distribution, and the determination of the preferences and priorities to be accorded to claims. *United States Fidelity and Guaranty Company* v. *Bray,* 225 U. S. 205, 217. However, the question remains, what rights of priority the Government possesses?

Point I

When the Bankruptcy Act of 1898 was adopted the United States had priority for all debts. The question, therefore, is not whether the Bankruptcy Act gave the Government priority for debts other than taxes, but whether it destroyed a priority which the Government already possessed

When the Bankruptcy Act became a law on July 1, 1898, the United States for more than a century had been and was then entitled to priority of payment from the assets of insolvents under Section

5 of Chapter 20 of the Act of March 3, 1797 (1 Stat. 515), which was subsequently incorporated into the Revised Statutes as Section 3466. *United States* v. *Fisher, supra.* That statute has a broad application. As this court pointed out in *Beaston* v. *Farmers Bank,* 12 Pet. 102, 134:

> All debtors to the United States, whatever their character, and by whatever mode bound, may be fairly included within the language used in the fifth section of the Act of Congress. And it is manifest, that Congress intended to give priority of payment to the United States over all other creditors, in the cases stated therein.

This court has also pointed out, *Lewis, Trustee,* v. *United States,* 92 U. S. 618, that the language of the statute is without qualification; that it affects all persons indebted to the United States; that the form of the debt is immaterial; and that the only condition of the Government's right to priority is that there be bankruptcy or insolvency as the latter is defined by the statute and the authorities upon the subject.

During the century prior to the adoption of the Act of 1898 successive bankruptcy acts (Act of 1800, Sec. 62, 2 Stat. 19, 36; Act of 1841, Sec. 5, 5 Stat. 440, 444; Act of March 2, 1867, Sec. 28, 14 Stat. 517, 530) had left the Government's right of priority undisturbed and unimpaired, so that in all that period it extended as well to those insolvents who had been formally adjudged bankrupts as to

those who had not. *United States* v. *Fisher, supra; Lewis, Trustee,* v. *United States, supra.*

Immediately prior to the passage of the Bankruptcy Act of 1898, therefore, the Government possessed this ancient right which had persisted in full vigor from the very dawn of the Republic. The Government's right to priority needed no recreation, no reenactment, no affirmation, no sanction. To continue indefinitely it needed only to be left alone. The question is, accordingly, not whether the Bankruptcy Act of 1898 *gave* any right of priority to the United States but whether and to what extent it *took away* the right which the United States then possessed. The question is not whether the Bankruptcy Act *creates* that right but whether it *repudiates* it.

It does not do so expressly. If it reverses the policy of a century, it does it so furtively that for a generation its purpose has not been apparent. Courts and litigants alike have been unaware of it. The annual reports of the Attorneys General show that prior to June 30, 1924, more than 550,000 bankruptcy proceedings were instituted under the Bankruptcy Act of 1898. In all those proceedings and in all that time priority for debts other than taxes has been denied the Government in a single reported decision, that here under review. On July 21, 1899, *little more than a year after the passage of the Act,* the District Court for the District of Massachusetts held a county entitled to priority; on April 20, 1900, the Circuit Court of Appeals af-

firmed that decision (*In re Worcester County,* 102 Fed. 809, 815), in effect sustaining the priority of the United States. For nearly three decades representatives of the Government have consistently asserted that right; the trustees of bankrupts and their attorneys have rarely disputed it; and the courts have invariably recognized it.[1]

The uniform construction placed upon Section 64 of the Bankruptcy Act of 1898 by the lower federal courts will be given weight by this court in construing the same provisions of that Act. *Texas & Pacific Railroad Co.* v. *Abilene Co.,* 204 U. S. 426, 447; *Bate Refrigerating Co.* v. *Sulzberger,* 157 U. S. 1, 34. This court will also give weight to the policy of Congress relating to any matter when construing an act relating to the same subject. *Union Pacific Railroad Co.* v. *Mason City Railroad Co.,* 199 U.S.160, 167; *Blair* v. *Chicago,* 201 U. S. 400, 469. And, as we have seen, in the century preceding the enactment of the Bankruptcy Act of 1898, no principle was more firmly embedded in Congressional policy than that of the Government's priority. An intention of Congress to abandon that policy should not be presumed from

[1] *In re Stoever* (D. C. Pa.), 127 Fed. 394; *In re Western Implement Co.* (D. C. Minn.), 166 Fed. 576; S. C. (C. C. A. 8th Ct.), 171 Fed. 81, per Van Devanter, J.; *In re Devlin* (D. C. Kan.), 180 Fed. 170; *United States* v. *Birmingham Trust & Savings Co.* (C. C. A. 5th Ct.), 258 Fed. 562, 566, cert. denied, 251 U. S. 550; *In re Hibner Oil Co.* (C. C. A. 7th Ct.), 264 Fed. 667; *In re Tidewater Coal Exchange* (C. C. A. 2nd Ct.), 280 Fed. 648, cert. denied, 260 U. S. 721; *Matter of Atlantic, Gulf & Pacific Steamship Co.* (D. C. Md.), 289 Fed. 145; *In re Gubelman et al.* (C. C. A. 2nd Ct.), not reported; *Cf. Walkof* v. *Fox,* 153 N. Y. Supp. 27.

provisions of the Bankruptcy Act of 1898 which are fairly susceptible of another construction. *Holden* v. *Stratton,* 198 U. S. 202.

Point II

Since Section 3466, R. S., was not expressly repealed by the Bankruptcy Act of 1898, the Government's right of priority could have been destroyed only by such inconsistency or repugnancy between the two statutes as makes it impossible to give effect to both of them

Since the problem is to ascertain whether Congress intended by the Bankruptcy Act of 1898 to destroy the Government's priority for debts other than taxes, the following rules of statutory construction are pertinent:

1. Generally, the United States is not bound by the words of a statute unless named therein, if the statute tends to restrain or diminish its rights, powers, or interest. *United States* v. *Herron,* 20 Wall 251; *Lewis, Trustee,* v. *United States supra; Guarantee Company* v. *Title Guaranty Company, supra.*

2. That principle of statutory construction was applied by this court in the cases above cited to insolvency laws. It is founded in the presumption that when the legislature intends to divest the sovereign of any right, privilege, title, or interest it will do so in express words, and where the act contains no words to express such an intention it will be assumed that it did not exist. *United States* v. *Herron, supra.*

3. The construction of a statute depriving the Government of any right, privilege, title, or interest is unwarranted unless demanded by the most explicit verbiage or irresistible implication. *Murray* v. *Wilson Distilling Co.,* 213 U. S. 151. *Cf. Guarantee Company* v. *Title Guaranty Company, supra.*

4. Repeals by implication are not favored and will not be found to exist if there is any other reasonable construction. *Barney* v. *Dolph,* 97 U. S. 652, 656; *Beals* v. *Hale,* 4 How. 37, 53.

5. This principle is particularly applicable and most strictly enforced where the implied repeal would operate to deprive the Government of an existing right. *The Reform,* 3 Wall. 617, 633; *Wood* v. *United States,* 16 Pet. 342, 363; *United States* v. *Walker,* 22 How. 299, 311.

6. To repeal by implication there must be such a repugnancy between the old law and the new that they can not stand together. *Barney* v. *Dolph, supra; Beals* v. *Hale, supra.*

7. Section 3466 R. S. and Section 64 of the Bankruptcy Act of 1898 are *in pari materia, Lewis, Trustee* v. *United States, supra; Guarantee Company* v. *Title Guaranty Company, supra; Plummer* v. *Murray,* 51 Barb. (N. Y.) 201, 202; *Kohlsaat* v. *Murray,* 96 U. S. 153, 160, and must be construed together as parts of the same statute enacted at the same time.

Point III

Since it is possible to give effect to both statutes by construing the term "person" as used in Section 64 b (5) of the Bankruptcy Act of 1898 to include the United States, that construction must be adopted.

There is an inconsistency between Section 3466, R. S., and Section 64 of the Bankruptcy Act, and to the extent of that inconsistency, but no further, the former must yield to and is superseded by the latter. By the Revised Statutes there is no distinction between the claims of the Government. Whatever their character, they must be first satisfied. There is no superior right of priority. The Bankruptcy Act differentiates between taxes and other debts due the Government and subordinates the latter to wages within prescribed limits. As this court said in *Guarantee Company* v. *Title Guaranty Company,* ubi supra, 159, 160:

> It will be seen, therefore, that by the statute of 1797 (now §3466) and §5101 of the Revised Statutes all debts due to the United States were expressly given priority to the wages due any operative, clerk, or house servant. A different order is prescribed by the act of 1898, and something more. Labor claims are given priority, and it is provided that debts having priority shall be paid in *full.* The only exception is "taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality." These were civil obligations, not personal conventions, and preference was given to them, but as to debts we must as-

> sume a change of purpose in the change of order. And we can not say that it was inadvertent. The act takes into consideration, we think, the whole range of indebtedness of the bankrupt, national, state, and individual, and assigns the order of payment. The policy which dictated it was beneficent and well might induce a postponement of the claims, even of the sovereign in favor of those who necessarily depend upon their daily labor. And to give such claims priority could in no case seriously affect the sovereign. To deny them priority would in all cases seriously affect the claimants.

There is no intimation in the court's opinion that the claims of the Government thus *postponed* to those of wage earners are denied all priority, and the Bankruptcy Act is fairly susceptible to no other construction than that Congress intended, not to destroy the Government's priority but merely to change its order of payment. Construed in that manner the sole inconsistency between the Bankruptcy Act and Section 3466, R. S., disappears. Construed in that manner, the two statutes become harmonious and full effect is given to both of them. Construed in that manner, it becomes unnecessary and impossible to conclude Congress intended to destroy the Government's priority in a manner so subtle that it has escaped detection for a generation.

That construction does not involve the creation of a right by implication; it merely avoids the *destruction* of a right in that manner.

Obviously Section 64 of the Bankruptcy Act is not self-sufficient. It deals with priorities, but it does not contain within itself everything essential to determine what debts have priority or what their relative order of payment shall be. It is not a separate code of priorities, unlimited and unenlarged by other statutory provisions dealing with the same subject. *City of Richmond* v. *Bird,* 249 U. S. 174; *Oliver* et al. v. *United States* et al. (Adv. Op. No. 180, Oct. Term, 1924). In the latter case the court said:

> Paragraph "a" directs that "the court shall order the trustee to pay all taxes legally due and owing * * * in advance of (*not next preceding*) the payment of dividends to creditors"—that is, partial payments to general creditors. *City of Richmond* v. *Bird,* supra. It does not undertake otherwise to fix the precise position which shall be accorded to them. This, we think, must be determined upon consideration of the circumstances of each case and the provisions of relevant Federal and local laws—e. g., those which prescribe liens to secure or special priority for tax claims. It also appears, plainly enough, that all debts mentoned in Paragraph "b" must be satisfied before any payment to general creditors.
>
> *Guarantee Co.* v. *Title Guaranty Co., supra,* declares that the taxes of Paragraph

"a" are "civil obligations, not personal conventions, and preference was given to them" over the wages specified by Clause (4), Paragraph "b." We adhere to this as a correct statement of the general rule to be followed whenever it does not clearly appear that the particular tax has been subordinated to claims for wages by some relevant law.

Section 64 b (5) expressly incorporates within itself all Federal and state laws *in pari materia.* Section 3466, R. S., is, of course, such a law, and the two laws must therefore be read and construed together. There is no difficulty in giving effect to both of them. If the word "person" in Section 64 b (5) of the Bankrupty Act is construed, as it must be construed, to include the United States, the priority accorded to the United States by Section 3466 for debts other than taxes is preserved and only the order of its priority is changed. That construction is imperatively required, not only by rules of statutory construction but by the language of the Bankruptcy Act itself.

Point IV

The United States is a person within the meaning of Section 64 b (5) of the Bankruptcy Act of 1898

Section 64 b (5) of the Bankruptcy Act must be considered in connection with the following provisions of Section 1:

> Section 1. Meaning of Words and Phrases.—a The words and phrases used in

this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be considered as follows: * * * (6) "corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association; * * * (19) "persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations; * * * (24) "States" shall include the Territories, the Indian Territory, Alaska, and the District of Columbia.

In its opinion the court below made no reference to, and as far as appears from its opinion, did not consider, the statutory definition of "corporations." That definition is by its terms all inclusive.

All bodies having *any* of the powers and privileges of private corporations not possessed by individuals or partnerships are included. The definition is not limited to private corporations or to private bodies having such powers and privileges.

Nor is the scope of the definition restricted by the express inclusion of certain limited or other partnership associations. *In re Harper,* 175 Fed. 412, 423. If Congress had intended to restrict the definition of " corporations " to private corporations or private partnership associations, it is hardly to be assumed that such inappropriate language as *all bodies* would have been used for that purpose.

That the United States and the States have the juridical status of corporations has been declared by this court and the State courts from the earliest times. *Cotton* v. *United States,* 11 How. 229, 231; *Van Brocklin* v. *Tennessee,* 117 U. S. 151, 154; *Respublica* v. *Sweers,* 1 Dall. (Pa.) 41; *People* v. *St. Louis,* 10 Ill. 351; *Territory* v. *Hildebrand,* 2 Mont. 426; *State of Indiana* v. *Woram,* 6 Hill (N. Y.) 33; *Dickson* v. *United States,* 125 Mass. 311. See also *United States* v. *Maurice,* 2 Brock. 96, Fed. Cas. No. 15747; *Dixon* v. *United States,* 1 Brock. 177, Fed. Cas. No. 3934. In the *Maurice* case, Chief Justice Marshall, sitting as a circuit justice, said:

> The United States is a government, and, consequently a body politic and corporate, capable of attaining the objects for which it was created, by the means which are necessary for their attainment. This great *corporation* was ordained and established by the American people, and endowed by them with great powers for important purposes. (Italics ours.)

As a corporation the United States possesses some of the powers and privileges of private cor-

porations, e. g., the powers and privileges of perpetual succession, of suing and, with its consent, being sued, and of contracting in its own name. Hence, the United States must be regarded as a corporation and, therefore, as a person as that term is used in Section 64b (5) of the Bankruptcy Act of 1898, unless to include the United States would be inconsistent with the context. There is nothing in the text of Section 64 which makes it inconsistent to construe the word "person" in that manner. It is therefore mandatory upon the courts so to construe it. There is no choice; it is so written.

It struck the court below as strange that the United States should be referred to in the Bankruptcy Act of 1898 as a person. This court, however, has not hesitated to classify the United States and the several States as persons. *Stanley* v. *Schwalby,* 147 U. S. 508, 517; *Cotton* v. *United States, supra.* See also *State of Indiana* v. *Woram, supra; Republic of Honduras* v. *Soto,* 112 N. Y. 310; *Giddings* v. *Holter,* 19 Mont. 263; *Peters* v. *Grubb,* 21 Pa. St. 455, 465; *State* v. *Herold,* 9 Kans. 194, 199.

The failure to include the United States and the States by name within the statutory definitions of "corporations" and "persons" is without significance. The concept of the United States and the States both as corporations and as persons, was a familiar one long prior to the enactment of the Bankruptcy Act. Furthermore, in other sec-

tions of the Bankruptcy Act the United States and the States are plainly included within the word "persons."[2] It is true, of course, that the word "persons" never includes the United States or the States where their inclusion would be inconsistent with the context. The fact that the word "persons" is used at any place in the Bankruptcy Act as inclusive of the United States and the States where consistent with the context, is convincing proof of the meaning of that word as used in Section 64b (5).

Throughout the Bankruptcy Act the United States and the States are obviously included, not only within the word "persons" but within other generic terms.[3] Indeed, the draftsman's purpose was evidently to avoid repetition as much as possible by the use of definitions. The United States and the States as distinguished from their courts, laws, territories, etc., are expressly mentioned in the Act only in six instances,[4] one of which is Section 64

[2] E. g. Sections 14b(3), as amended, 1903 and 1910, 7a(9), 48e, as amended, 1910, and 70a(3).

[3] They are obviously included within the term creditors as used in Sections 3a(1), 39a(2), 57i, within the term claimants, as used in Sections 21c, 57c, 65e, and within the term parties, as used in Sections 24b, 39a(9), 47a(2).

[4] SECT. 1. (24) "States" shall include the Territories, the Indian Territory, Alaska, and the District of Columbia.

SECT. 17. Debts not Affected by a Discharge. *a* A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the *United States*, *the State*, county, district, or municipality in which he resides.

SECT. 50. Bonds of Referees and Trustees. *h* Bonds of referees, trustees, and designated depositories * * * may be sued upon in the name of the *United States* * * *.

SECT. 57. Proof and Allowance of Claims. *j* Debts owing to the *United States*, a *State*, a county, a district, or a municipality as a

a. In each of those instances it is manifest that it would have been impossible to avoid expressly naming the United States and the States by the use of any of the words defined in Section 1. In no instance in which the United States and the States could be appropriately included within generic terms have they been referred to *eo nomine*.

The failure expressly to name the United States and the States in Section 64b (5) would, therefore, seem to be without significance. There is no reason why that one paragraph should have been made an exception to the draftsman's general practice of avoiding repetition by the use of generic terms whenever possible.

This court has held, *Guarantee Company* v. *Title Guaranty Company, ubi supra,* 158, that the United States is included within the term "creditor" as defined in Section 1 (9), which is as follows:

> (9) "Creditor" shall include *anyone who* owns a demand or claim provable in bankruptcy, and may include *his* duly authorized agent, attorney, or proxy. (Italics ours.)

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penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transactions, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby, and such interest as may have accrued thereon according to law.

SECT. 61. Depositories for Money. *a* Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, * * * and shall require bonds to the *United States*, subject to their approval, to be given by such banking institutions, * * *.

SECT. 64. Debts which have Priority. *a* The Court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the *United States*, *State*, county, district, or municipality in advance of the payment of dividends to creditors * * *. (*Italics ours.*)

If the United States is included within the term "creditor," it can only be because it is also included within the word "anyone." We have some difficulty in understanding why the United States may not be appropriately described as a "person" in Section 64b (5), if it may be included within the word "anyone" and the pronouns "who" and "his." Throughout the Act the United States is frequently included within *personal* pronouns.[5] The contention that the United States is not entitled to priority for debts other than taxes under the Bankruptcy Act of 1898 is largely predicated upon its inclusion within the term "creditors," an inclusion made possible only by the fact that the United States may be appropriately referred to as "anyone." And yet those who make the contention cavil at the inclusion of the United States in the word "person" in Section 64b (5).

Thus the Bankruptcy Act contains within itself the guides to its own construction. There is no occasion to look beyond its confines and to seek extraneous aids to construction in the form of prior bankruptcy acts or the legislative history of the present Act. The Bankruptcy Act points irresistibly to the conclusion that the United States is a person within the meaning of 64b (5). It therefore recognizes the Government's priority for debts other than taxes under Section 3466, R. S., a law of the United States.

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[5] 1a (23) [who, his]; 39a (1) [whom] 59b [who, whose]; 60a [his].

In fact, Learned Hand, J., sitting in the District Court, suggested in the *Tidewater* case that if the United States is not included within the term "person" as used in Section 64b (5), then, in so far as that section undertakes to preserve priorities created by the laws of the United States, it is meaningless, for—

> * * * So far as anyone has found it [the United States] is not only a "person" but the only "person" * * * entitled to priority "under any law of the United States."[6]

In answer it has been said that two classes of persons are entitled to priority under the laws of the United States, namely, (1) persons entitled to priority under the laws of the United States applicable to the District of Columbia and the Territories, and (2) sureties who are subrogated to the rights of the United States under Section 3468 R. S. This ignores the statutory definition of "States" (Section 1a (24)), as including the Territories, Indian Territory, Alaska, and the District of Columbia. In view of that definition, it is clear that if there were such laws when the Bankruptcy Act was passed they were regarded not as laws of the United States but as laws of the States. Furthermore, a careful search has failed to reveal that on July 1, 1898, there was in existence a single law theretofore enacted by Congress creating or regulating priorities in the District of Columbia or

[6] Quoted in *United States* v. *Wood*, 290 Fed. 109, 114.

in the Territories, and we have been referred to none.

The suggestion that Section 64b (5) was designed to preserve the rights of sureties on bonds for taxes under Section 3468 R. S. is equally untenable. In *United States* v. *National Surety Company, supra,* 75, this court said:

> Section 3468, applying an established rule of the law of subrogation, *Lidderdale* v. *Robinson,* 12 Wheat. 594, 596, declares that when a "surety pays to the United States the money due upon * * * (a) bond, such surety * * * shall have the *like priority* for the recovery * * * of the moneys * * * as is secured to the United States. (Italics ours.)

It is clear that the priority "secured to the United States" in such cases is a priority for *taxes* and is therefore included within Section 64a and not within Section 64b of the Bankruptcy Act. The surety, having *like priority,* would enforce it under paragraph *a* rather than under paragraph *b* of Section 64. If the priority of the United States under Section 3466 R. S. is not perpetuated by Section 64 b (5), then it is clear that the priority of sureties under Section 3468 R. S. is not continued by that part of the Section, for otherwise the surety would be subrogated to a right which is nonexistent.

The suggestion is also made that if Judge Hand was correct, Congress would have expressly named

the United States in Section 64 b (5) as the only person entitled to priority under the laws of the United States. Whatever validity that suggestion might have were Section 64 b (5) confined to persons entitled to priority under the laws of the United States, disappears in the light of the fact that that Section also perpetuates priorities under the laws of the States. The plain purpose of the statute, as far as the priority of the United States for debts other than taxes is concerned, was to put the United States on a parity with persons entitled to priority under the State laws; it was, therefore, perfectly logical to include the United States and all such persons in a single generic term comprehensive enough to include both the United States and such other persons.

Moreover, the suggestion resolves itself into this, that since different and more explicit language might have been used in the statute, therefore the language actually used is without meaning.

If the United States is not a person within the meaning of that term as used in Section 64 b (5), neither are the several States, as the court below recognized. During the century which preceded the enactment of the bankruptcy law priority for payment of debts due the States was as fundamental in their policy as in the policy of the United States. See *Marshall* v. *New York*, 254 U. S. 380. It may well be doubted that Congress intended so lightly and by such an indirect method to deprive the sov-

ereign States of rights which they had so long possessed.

It has been said that it is inconceivable that Congress intended to preserve the priorities of the United States and the States by means of a definition which did not name them but which was comprehensive enough to include them. It is much more difficult to conceive that Congress intended to deprive the United States and the States of their priorities by a failure to name them in a definition broad enough to include them.

Furthermore, if the construction of Section 64 b (5) which would deprive the United States in bankruptcy proceedings of priority for debts other than taxes, is correct, then an intention must be imputed to Congress to discriminate between the creditors of those insolvents who are adjudged bankrupts and those who are not, for admittedly Section 3466 R. S. is still operative except in the field of bankruptcy. It is difficult to understand why Congress should have desired to give the United States priority as against the estates of deceased insolvents, for example, and to deny the United States a like priority against the estates of living bankrupts.

With the single exception of the learned court below the lower federal courts have uniformly placed the construction for which we contend upon the Bankruptcy Act. Furthermore, it would seem that the question is no longer an open one in this court. *United States* v. *National Surety*

Company, 254 U. S. 73; *Guarantee Company* v. *Title Guaranty Company, supra.* The court below was of the opinion that the *National Surety* case did not decide the question, and that the *Guarantee* case supported its conclusion that the United States has no priority in bankruptcy except for taxes. It would be a work of supererogation for counsel to argue to this court what it did or did not decide in a given case, and yet we find it difficult to believe that this court, with knowledge of the trend of decision in the lower courts, would have gone through the form, in the *National Surety* case, whatever the concession of counsel may have been, of determining the relative priorities of parties, neither of whom in its opinion was entitled to any priority either as against the other or as against anyone else, or would have taken such pains, in the *Guarantee* case, to demonstrate that wages were to be paid before debts due the United States if in its opinion the United States ranked merely as a general creditor.

Point V

Neither the phraseology of the Act of 1898, considered in connection with that of prior bankruptcy acts, nor the legislative history of that Act, discloses any purpose to destroy the priority of the United States for debts other than taxes

Since the terms of the Act of 1898 make it clear that the United States is included as a person in Section 64 b (5), it would seem that if resort is

made to aids to construction, it must be for the purpose of creating rather than of solving an ambiguity.

Since prior bankruptcy acts reaffirmed the priority of the United States *eo nomine* for debts as well as taxes, and since the Acts of 1841 and 1867 also provided for the priority of *persons* entitled thereto under the laws of the United States, it is contended, first, that the failure of Congress to recognize the priority of the United States in the Act of 1898 in the identical terms in which that recognition was couched in prior acts resulted in the destruction of that priority; and, second, that because the United States was not included in the word "persons" as used in the priority clauses of previous acts, it could not have been intended to include the United States in that word when repeated in Section 64 b (5) of the present Act. It is also contended that the legislative history of the Act of 1898 demonstrates the correctness of that argument.

The differences in phraseology between the priority clauses of prior bankruptcy acts and that of the present Act is sufficiently explained by the legislative purpose to assign a different order of payment to the priority of the United States and of the States for their debts. In the Act of 1867, for example, the order of priority was (1) costs of administration; (2) debts and taxes due the United States; (3) debts and taxes due the States; (4) wage claims; and (5) debts due persons entitled to

priority under the laws of the United States. The reason why the United States was not included in the fifth order of priority in the Act of 1867 was not because the meaning of the word " persons " is not comprehensive enough to include the United States, but because Congress intended that both debts and taxes due the United States should have a higher order of priority than that granted other " persons." The United States was not included in the word " persons," as there used, only because the context shows that it was not the legislative intent that it should be.

The Act of 1898 made radical changes in the order of priority contained in the Act of 1867. *Guarantee Company* v. *Title Guaranty Company, supra.* Congress no longer desired the United States to have any priority over the States for either debts or taxes, or the United States and the States to have priority for their debts, other than taxes, over debts owing to other persons who were entitled to priority. In execution of the legislative intent provision was therefore made in Section 64a for the equal priority of the United States and the States for their respective taxes, and in Section 64 b (5) for the priority of the United States, the States, and all other persons entitled to priority.

The meaning of the word " person," as used in the priority clause of the Act of 1898 is therefore not restricted by its context as it was in the Act of 1867. In view of the comprehensive manner in which the word " persons " is defined in the Act of

898, and of the habitual practice of the draftsman o employ generic terms wherever possible, the ording of Section 64–b(5) is skillfully designed o accomplish the legislative intent to preserve the riority of the United States for debts other than axes and at the same time to place the United States, with respect to such debts, on an equality with the States and other persons entitled to priority.

In *Benziger* v. *United States*, 192 U. S. 38, it appeared that the tariff acts prior to 1897 placed "statuary" and "casts of plaster of Paris" in the free list. In the Act of 1897 "casts of plaster of Paris" were omitted from the free list. It was accordingly argued that it must have been the intention of Congress to make them dutiable. This court held that they were included in the words "statuary" and said at p. 47:

> *We do not attach any very great importance, as evidence of the intention of Congress, to the omission in the act of 1897 above referred to.* The language used in paragraph 649 is very broad, including all casts of sculpture, as well those heretofore mentioned in paragraphs in prior statutes similar to paragraph 638 as others. The omission in the latter paragraph was, therefore, immaterial if these figures are casts of sculpture. Although they might heretofore have come in under the designation of "casts of plaster of Paris," as contained in the former paragraphs, we think they also

> might have come in under the designation "casts of sculpture" contained in the act of 1894 as well as in the act of 1897, and that it was not intended by Congress, in omitting the words in the latter act as to casts of plaster of Paris, in paragraph 638, to prevent their free entry under paragraph 649. The language in paragraph 638 was simply unnecessary in a case where the same articles were entitled to free entry under another paragraph. (Italics ours.)

In *United States* v. *Herron, supra,* it was held that the word "creditor" as used in the Act of 1867 did not include the United States. In *Guarantee Company* v. *Title Guaranty Company, supra,* this Court held that the United States was included in the term "creditor" as used in the Act of 1898. In the light of those decisions and of the elaborate definitions contained in the Act of 1898 it is impossible to contend that words used in that Act should be given, regardless of the context, the same meaning which they had when used in the Act of 1867.

Nor does the legislative history of the Act of 1898 disclose any intention to deprive the United States of priority for debts in bankruptcy proceedings.

Between the date of the repeal, in 1878, of the Bankruptcy Act of 1867 and the enactment of the Bankruptcy Law of 1898, there were introduced into Congress more than eighty bills dealing with bankruptcy. Obviously, all of them are not included in the legislative history of the Act of 1898. That history began with the introduction in the

Senate in April, 1898, of the Lindsay Bill (Cong. Rec. 55th Cong., 1st Sess., pp. 601–609), the priority clause of which is as follows:

> SECTION 65. *Debts which have priority.*—a. Debts owing to the United States, a State, county, parish, being a political corporation, district, or municipality, after being proved and allowed, shall have priority only in the event and to the extent that they constitute a lien upon the property of the estate.
>
> (b) The debts to have priority, except as herein provided, and to be paid in full out of bankrupts' estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases; (3) the cost of administration, * * * (4) wages due to workmen, clerks, or servants which have been earned within three months of the date of the commencement of the proceedings, not to exceed $300 to each claimant; and (5) debts owing to any person which by the laws of the United States or a State are entitled to priority.

The Lindsay bill was amended in the Senate by striking therefrom everything after the enacting clause and by substituting therefor the Nelson bill (Cong. Rec., 55th Cong., 1st sess., pp. 799, 800), the priority clause of which was as follows:

> SEC. 9. That the following debts shall have preference in the order named, over other debts in the distribution of the estate of the

> bankrupt, to wit: First, debts due to the servants and laborers employed by the bankrupt for labor performed or services rendered within six months prior to the filing of the said petition. Second, taxes or revenues due the United States. Third, taxes due any state or territory or the District of Columbia. Fourth, taxes due to any county, parish, town, city, or village in the order named. But none of said debts shall be recognized or paid unless duly approved and allowed as prescribed in reference to other debts and claims against the bankrupt.

The Nelson Bill passed the Senate, but was amended in the House by striking therefrom everything after the enacting clause, and by substituting therefor a bill prepared by the Judiciary Committee of the House. (55th Cong. 2d Sess., H. R. Report 65, Cong. Rec. pp. 1778.) The priority clause of the House bill is identical with that of the Bankruptcy Act of 1898.

The House Bill and the Nelson Bill then went to conference and the conferees reported back (Senate Doc. 294, 55th Cong. 2d Sess.), as follows:

> That the Senate recede from its disagreement to the amendment of the House, and agree to the same with an amendment as follows: Strike out all of said amendment and insert in lieu thereof the following: (Exhibit A hereto annexed and made part of this report.) And the House agrees to the same.

Exhibit "A" became the Bankruptcy Act of 1898.

Such inferences as may reasonably be drawn from the legislative history of the present Act support the view that it was not the legislative intention to destroy the Government's priority for debts in bankruptcy proceedings. The provision in the priority clause of the Lindsay bill and certain prior bills that "debts owing to the United States * * * shall have priority *only* in the event and to the extent that they constitute a lien upon the property of the estate," shows clearly that the authors of those bills recognized that the unqualified priority of the United States under Section 3466, R. S., would continue unless expressly limited, and that their purpose was to restrict the Government's priority to instances where the Government's debt constituted a lien. That limitation was omitted from Section 64 of the conference bill which became the Act of 1898, and which contains no limitation upon the Government's priority for debts, but merely assigns to it a different order of payment.

There is not a single suggestion in the Congressional Record or in the committee reports that the bill which became the present Bankruptcy Act would have the effect of destroying the priority of the United States for debts in bankruptcy proceedings. In the twenty-seven years that have elapsed since the present Bankruptcy Act became a law Congress has seven times amended other parts of the Act and has twice amended Section 64 (32 Stat. 797, c. 487, § 14; 34 Stat. 267) with full

knowledge of the uniform construction which the courts were placing upon it, and yet none of these amendments makes any change in Section 64 b (5).

To say that if Congress had intended by the Act of 1898 to continue the Government's priority for debts as well as for taxes it would not have permitted the Government's right to such priority to rest upon ambiguous definitions and implications, is to view the question obliquely. It is very much more accurate to say that it could not have been the intention of Congress to destroy the Government's priority for debts by an implication which can be arrived at only by a most tortuous and elaborate process of reasoning.

As Senator Hoar, of Massachusetts, said in the Senate (Cong. Rec. 48th Cong. 1st Sess. p. 3004) upon the only occasion on which, as far as we have been able to discover, the Government's right to priority was ever discussed in Congress during the twenty-year interval between the repeal of the Act of 1867 and the enactment of the present law:

> It is the universal policy, I believe, of every state in this country and of every civilized government, and has been the uniform policy of this Government, from its foundation to give preference as against insolvent estates, whether of deceased persons or living persons who are insolvent, to its own debts and taxes, which are presumed to have been matters incurred for the carrying on of the Government itself, which is the paramount necessity of all

necessities. Now, it seems to me if that policy is to be changed it ought to be changed by some special enactment applicable to all cases alike. Why the United States should have its preference against the insolvent estate of every deceased person in the country and why it should reserve the advantage of having no statute of limitations run against it and all the other advantages, and then a Senator come in and make this little attack on the policy in a bankrupt law, I do not understand. I think that should be left to general legislation. I hope the provision will not be changed. If you remove the advantage of the United States you have also to remove the advantage from the States.

Point VI

Congress having declared it to be the national policy that the Government should have priority in bankruptcy proceedings for both debts and taxes, the wisdom of the policy is not open to question in the courts. Moreover, the policy declared by Congress accords with the dictates of a sound policy

As was said in *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 340, "when the lawmaking power speaks upon a particular subject over which it has constitutional power to legislate public policy in such a case is what the statute enacts." If that is true, it has undoubtedly been the national policy from the very beginning of the Republic, at least to the enactment of the present bankruptcy law, that the Government

should have priority of payment of all its demands. It strains credulity to believe that Congress intended to reverse that policy in the present bankruptcy act in a manner so difficult of detection that for almost a generation the bench and bar have been unaware of the legislative purpose.

The wisdom of the policy is a question for legislative and not for judicial consideration. If the present bankruptcy act preserves the Government's priority for debts as well as for taxes in bankruptcy proceedings, such priority continues to be a part of the national public policy. If the present bankruptcy act destroys the Government's priority, it is no longer a part of the national public policy. In the former case the wisdom of the policy is not open to question outside of the halls of Congress, and in the latter case it is entirely irrelevant.

After all, what is the question of public policy involved? It is obviously who should bear the loss sustained by the Government as the result of the insolvency of its debtors followed by bankruptcy—the Government, the bankrupt's general creditors, or the public. Clearly the loss must be borne either by the public or by the bankrupt's general creditors. The Government has no capital upon which it can draw to meet its losses. It can meet them through taxation, which means, of course, that in the last analysis the taxpayers will bear them. Accordingly, the question of policy is whether such losses should be met by taxation to the detriment of the public or from the assets of the Government's

debtors to the detriment of general creditors. The only factors to be considered, therefore, in determining the question of policy are the public and the general creditors.

What reason is there for fastening this loss upon the public rather than upon the general creditors? The taxpayer is a defenseless bystander. Of his own accord, the general creditor has entered into some business transaction for the purpose of gain. To earn a profit the general creditor is willing to assume the risks inherent in business transactions, one of which is that his debtor will fail, indebted not only to him but to the Government, State, and municipality for taxes, to the landlord for rent, to wage earners, and to other persons entitled to priority of payment from the bankrupt's estate. If the Government's priority extends to debts other than taxes, the risk of the general creditors is only slightly increased, and it can not be magnified by attempts to picture the Government as being actively engaged in commerce. In any event, if the risks are so great that the possibility of loss overpowers the desire for profit, the general creditor will not assume them. If he does assume them and suffers a loss, unlike the taxpayer, he has a chance to recoup that loss from his next venture.

If, as this court has said in *United States* v. *Bank of North Carolina,* 6 Pet. 29, 35, the Government's right of priority is designed to secure an adequate revenue to sustain the public burdens and to discharge the public debts, there would seem to be no

greater reason for giving the Government priority for taxes than for its other debts. It is a matter of common knowledge that the Government's priority for taxes does not result in their payment in the year in which they are due. In practically every case in which the Government claims priority for taxes, they have lost their character as part of the current revenues, and are not available to meet the necessities of current operations. It is true that if they are not paid at some time, the deficit will have to be met in some way, but that is equally true when the Government sustains other losses as the result of the insolvency of its debtors. A dollar lost by the Government must be replaced, whether it was originally payable as the result of a civil obligation or of a personal convention. It is difficult, therefore, to appreciate the reasons which make it a desirable policy to impose upon general creditors the loss of to-day's taxes, and an undesirable policy to impose upon them the loss of the taxes of to-morrow necessary to make good uncollectible debts.

If the question were whether the Government or the general creditor should bear the loss, then the origin of the obligation might be a material consideration, but it seems entirely immaterial in determining whether the incidence of the loss should be upon the taxpayer or upon the general creditor. Whatever the character of the loss, the taxpayer or the general creditor must bear it. The question therefore becomes solely a question of their relative

equities, and those of the taxpayer seem to be as great, to say the least, as those of the general creditor.

If, as Congress has declared, it is a sound policy that the general creditors of a bankrupt should bear the losses resulting from bankruptcy in taxes, rent, wages, and other indebtedness of the bankrupt; if, as Congress has declared, it is a sound policy that the Government should have priority for its debts other than taxes when bankruptcy does not follow insolvency, it is difficult to see why it is not an equally sound policy that the Government should have priority in bankruptcy for all of its debts. There would seem to be little reason for any discrimination between general creditors of a bankrupt and the general creditors of living and deceased insolvents who have not been adjudged bankrupts.

As a matter of fact, every consideration which is to-day advanced against the wisdom of the policy of the Government's priority was raised with at least equal force more than a hundred years ago by Mr. Justice Washington in his dissenting opinion in *United States* v. *Fisher,* 2 Cranch. 358, 402. Nevertheless, in the century that has intervened, Congress has repeatedly adhered in legislation to that policy. With knowledge of the construction placed by the federal courts upon Section 64 of the Bankruptcy Act, Congress has amended that Act no less than nine times, and has amended Sec-

tion 64 twice, and yet no change whatever has bee
made in Section 64 b (5).

In these circumstances it seems particularly ap
propriate to refer to the language used by Mr. Jus
tice Miller in *Smoot's Case,* 15 Wall. 36, 45:

> There arises in the minds of the partie
> and counsel interested for the individua
> against the United States a sense of th
> power and resources of this great govern
> ment, prompting appeals to its magnanimit
> and generosity, to abstract ideas of equity
> coloring even the closest legal argument
> These are addressed in vain to this court
> Their proper theatre is the halls of Con
> gress, * * *
>
> It would be very dangerous, indeed, to th
> best interests of the Government * *
> if, adopting the views so eloquently urged b
> counsel, that court, or this, should depar
> from the plain rule laid down above and ren
> der decrees on the crude notions of th
> judges of what is or would be morally righ
> between the government and the individual

B

THE SECOND QUESTION

Point VII

**This court has repeatedly held that claims of the Direc
tor General of Railroads arising out of federal con
trol are claims of the United States of America in it
sovereign capacity**

The decision of the learned district judge (R
pp. 16, 17) that

> * * * For all these charges the Government Agent has a lien upon the articles transported. It was the duty of that Agent to have collected all these charges before delivery of the articles to the consignees. Having seen fit to waive that lien and deliver the articles to the consignee without collecting the charges for which he had a lien the Agent of the Government under the circumstances of this case is not entitled to a prior lien upon the general estate of the bankruptcy consignee,

is obviously erroneous in that the articles were not delivered to the consignee but were sold and the proceeds applied in part payment of the amounts due for freight, storage, demurrage, and war taxes. (Tr. pp. 11, 13.) The opinion of the district judge in this respect was wholly disapproved by the circuit court of appeals, Judge Woods saying:

> We are unable to agree with the Referee and the District Judge that the debts due to the Director General were not debts due to the United States of the character given priority by Section 3466 of the Revised Statutes. The Supreme Court has decided otherwise. (Petition for writ of certiorari, p. 22.)

In *DuPont De Nemours* v. *Davis,* 264 U. S. 456, 462, this court said:

> In taking over and operating the railroad systems of the country the United States did so in its sovereign capacity, as a war meas-

ure, " under a right in the nature of eminent domain." *North Carolina R. R. Co.* v. *Lee,* 260 U. S. 16; *Missouri Pacific R. R. Co.* v. *Ault,* 256 U. S. 554; *Northern Pacific Ry. Co.* v. *North Dakota,* 250 U. S. 135; *In re Tidewater Coal Exchange,* 280 Fed. 648, 649; and it may not be held to have waived any sovereign right or privilege unless plainly so provided. Moneys and other property derived from the operation of the carriers during Federal control, as we have seen, are the property of the United States. Sec. 12, 40 Stat. 457. An action by the Director General to recover upon a liability arising out of such control is an action on behalf of the United States in its governmental capacity. (*Ches. & Del. Canal Co.* v. *United States,* 250 U. S. 123, 126; *In re Tidewater Coal Exchange, supra.*)

The Federal courts in the various circuits have overwhelmingly sustained the contention that the Director General of Railroads is entitled to the same priority as the United States.

In re Hibner Oil Co. (C. C. A. 7th Cir.), 264 Fed. 667.

In re Tidewater Coal Exchange (C. C. A. 2d Cir.), 280 Fed. 648.

Davis v. *Pullen* (C. C. A. 1st Cir.), 277 Fed. 650.

Davis v. *Miller Link Co.* (C. C. A. 5th Cir.), 296 Fed. 649.

It has been held that the Government in operating the railroads acted in its sovereign capacity;

hat moneys derived from their operation are the roperty of the United States; that the Government n the collection of such moneys is not subject to me limitations; that the Government is not subject o penalties imposed upon the railroads by State ws even if enforceable against the railroads under rivate control; and that the Government may not e held to have waived any sovereign right or privege unless plainly so provided.

Du Pont de Nemours v. *Davis, supra.*

Davis v. *Corona Coal Co.,* 265 U. S. 219, 222.

Mo. Pac. R. R. Co. v. *Ault,* 256 U. S. 554, 559.

In *Davis* v. *Michigan Trust Co.,* 2 Fed. (2d) 94, 197 (certiorari granted), the Circuit Court f Appeals of the Sixth Circuit, disagreeing with he other circuits, held in an equity receivership hat section 10 of the Federal Control Act (40 Statutes, Mar. 21, 1918, c. 25 (Comp. Stat. Ann. Supp. 1919, Sec. 3115¾ j)) placed the Director General, when collecting money, in the same status s the carriers and subjected him to the rules previously applied to the railroads.

In *Davis* v. *Corona Coal Co.,* 265 U. S. 219, 222, his court said:

> The provisions of section 10 of the Federal Control Act of March 21, 1918, c. 25, 40 Stat. 451, 456, subjecting carriers "to all laws and liabilities as common carriers, whether arising under State or Federal

laws or at common law, except " &c., rightly was said by the counsel for the petitioner to do no more than subject operations of the carriers to existing laws.

This court has explained the distinction between the carriers, the Government as operator of railroads and the sovereign as owner of the moneys earned. The carriers were subject to all laws, Federal and State. Whatever the position of the Government as operator of the railroads may have been under section 10 and other applicable statutes (*Missouri Pacific R. R. Co.* v. *Ault*, 256 U. S. 554, 559, but see *Standard Oil Company of New Jersey* v. *Southern Pacific Co. et al.*, decided April 20, 1925, — U. S. —), as owner of the moneys earned, the United States has surrendered none of its sovereign rights or privileges (sec. 12)[1]; and it is in the latter capacity that the present claims are asserted. *Du Pont De Nemours* v. *Davis*, 264 U. S. 456, *Davis* v. *Corona Coal Co., supra.*

It necessarily follows that the claims asserted by the Director General in behalf of the United States are entitled to the same priority as all other debts due the Government.

[1] That moneys and other property derived from the operation of the carriers during Federal control are hereby declared to be the property of the United States. (Sec. 12, Act of Mar. 21, 1918, c. 25 40 Stat. 457.)

CONCLUSION

The orders should be reversed and the Court below directed to enter orders decreeing that the claims of the petitioner are entitled to priority over the claims of general creditors of the bankrupt.

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Of counsel.

O

No. 1085.

Supreme Court of the United States

OCTOBER TERM, 1924.

MIDDLETON S. BORLAND, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONER

GODFREY GOLDMARK,
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New York.

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Supreme Court of the United States,

OCTOBER TERM, 1924.

MIDDLETON S. BORLAND, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne, Petitioner, *against* UNITED STATES OF AMERICA, Respondent.	No. 1085.

BRIEF FOR PETITIONER.

This case comes here upon a writ of certiorari issued to the Circuit Court of Appeals for the Second Circuit, which court affirmed an order of the United States District Court for the Southern District of New York. The order of the District Court in turn affirmed an order of the Referee in Bankruptcy, which latter order decreed that the debt due the Postmaster General was entitled to prior payment over the debts due the general creditors of the bankrupts.

Question Presented.

The question presented is whether a contract debt due to the United States of America is entitled to payment before the debts due to ordinary creditors. Specifically the question is whether the debt is a debt owing to a "person" who by the laws of the United States is entitled to priority within the meaning of Section 64 (*b*) (5) of the Bankruptcy Act of 1898. If the United

States itself is a "person" within the meaning of that Section, then it is entitled to priority, because by a law of the United States, to wit, 3466 of the Revised Statutes, the United States would be entitled to priority. Stated in another way, the question is whether or not Section 3466 of the Revised Statutes has been incorporated by reference into the Bankruptcy Act by virtue of Section 64 (*b*) (5).

Applicable Statutes.

Bankruptcy Act.

Section 64 of the Bankruptcy Act, 30 Stat. 563, as amended by 32 Stat., 800, and 34 Stat., 267 (Comp. Statutes, §9641), provides:

> "Debts which have priority.—(*a*) The court shall order the trustee to pay all *taxes* legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.
>
> (*b*) The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United

States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the Court may allow; (4) wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) *debts owing to any person who by the laws of the States or the United States is entitled to priority.*"

3466 Revised Statutes.

Section 3466 of the Revised Statutes (Compiled Statutes of 1916, Section 6372), provides as follows:

> "Priority established.—Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

Statement of Facts.

A proof of claim was filed with the Referee by the United States of America in the sum of $148,403.02, based upon certain drafts purchased by the Post Office Department prior to the bankruptcy, which drafts were outstanding and unpaid when the petition was filed. The Trustee filed an objection to the claim on two grounds:

(1) that the amount claimed was in excess of the amount due; and (2) that the claimant was not entitled to the priority asserted.

The drafts upon which the claim is based were purchased by the Post Office Department under the following circumstances, as appears at page :

> "Mr. Ryan.—For the record, perhaps we might inform his Honor exactly how the claim arises.
>
> "As you already know, the Post Office Department issues foreign money orders and, of course, the foreign countries issue orders on this country and at certain times there is an accounting and a balance struck. That is what happened in this case, a balance was struck.
>
> "Now the practice has been for the Postmaster-General to purchase drafts with which to pay the balances and in this case he went to Knauth, Nachod & Kuhne and purchased these drafts—the drafts are payable to the Postmaster-General and he endorses them to the different countries."

The Referee reduced the amount of the claim to the sum of $147,462.32, the amount urged by the Trustee, and the Government is not appealing from that portion of the Referee's order.

The Referee sustained the claim of priority and his order was successively affirmed by the District Court and by the Circuit Court of Appeals upon authority of the decision of Court in *Matter of Tidewater Coal Exchange,* 280 Fed., 848. No opinion was written in this case by the Circuit Court.

Errors Relied Upon.

The errors relied upon are:

(1) That the courts below erred in affirming the order of the Referee in allowing the claim of the United States through its Postmaster-General as a priority claim.

(2) The courts below erred in holding that the United States of America was entitled to priority in payment of its claim filed through its Postmaster-General over the claims of the general creditors of the bankrupt.

Brief of Argument.

The petitioner contends:

1. The right of the United States to priority is not an inherent sovereign prerogative, and priority must be created by Congress in the exercise of the powers delegated to it by the Constitution.

U. S. vs. *Fisher*, 2 Cranch, 358, 395;
U. S. vs. *Bank of North Carolina*, 6 Peters, 29, 35;
U. S. vs. *Canal Bank*, 3 Story, 79 (F. C. No. 14715);
U. S. vs. *Oklahoma*, 261 U. S., 253;
Equitable Trust Co. vs. *Connecticut Brass*, 290 Fed., 712;
Strain vs. *U. S. Fidelity & Guaranty Co.*, 292 Fed., 694; aff'd 264 U. S., 570.

2. The United States obtains its priority in bankruptcy, if any there be, from the Bankruptcy Act itself and not from Revised Statutes, Sec. 3466.

Guarantee Title & Trust Co. vs. *Title Guaranty and Surety Co.*, 224 U. S., 152;
U. S. vs. *Wood, as Trustee in bankruptcy*, 290 Fed., 109; affirmed 263 U. S., 680.

3. The Bankruptcy Act of 1898 contains no express grant of priority to the United States *eo nomine* for an ordinary indebtedness, and the history of that act and

of the earlier Bankruptcy Act shows that the world "person" as used in Section 64 of the Act includes only private creditors and was not intended to include the United States itself; and therefore that R. S. 3466 is not incorporated into the Act by reference.

Fleet Corporation vs. *Wood*, as Trustee, 258 U. S., 549, at 574 (concurring opinion of Chief Justice Taft and Justices Van-Devanter and Clarke);
Bankruptcy Act of 1800, 2 Stat., 19, 36;
Bankruptcy Act of 1841, 5 Stat., 440, 445; Sec. 5;
Bankruptcy Act of 1867, 14 Stat., 530, Sec. 28;
Guarantee Co. vs. *Title Guaranty Co.*, 224 U. S., 152;
H. R. 8110 (54th Congress, First Session);
House Report, 55th Congress, 2nd Session, No. 65;
Congressional Record, id. p. 1787.

4. The Bankruptcy Act of 1898 despite the definitions contained therein, is not free from ambiguity as to the status of debts due the United States and therefore the prior acts and the history of the Act of 1898 can be resorted to for the purpose of resolving the ambiguity.

5. The cases relied on by the Government in the Courts below are not controlling.

6. A failure of Congress to create a priority for ordinary debts due the United States is in accordance with an enlightened and desirable public policy, and the Courts should not be astute to spell out an intent to the contrary. When the Government descends to the role of the private citizen and enters into contract relations, the losses which it sustains in excess of its *pro rata* share

of the assets should not be borne *by the other creditors of the bankrupt* but by *all* the people.

U. S. vs. *Fisher,* 2 Cranch, 358, 402, dissenting opinion;
U. S. vs. *Oklahoma,* 261 U. S., 253;
Davis vs. *Pringle,* 1 Fed. (2d), 860, 864;
McPhee vs. *U. S.,* 62 Colo., 421.

POINT I.

The right of the United States to priority is not an inherent sovereign prerogative right, and priority must be created by statutes enacted by Congress in the exercise of its delegated powers.

That the foregoing is true with respect to ordinary debts due the United States has never been disputed.

U. S. vs. *Fisher,* 2 Cranch, 358, 395;
U. S. vs. *Bank of North Carolina,* 6 Peters, 29, 35;
U. S. vs. *Canal Bank,* 3 Story, 79 (F. C. No. 14715);
U. S. vs. *Oklahoma,* 261 U. S., 253;
Equitable Trust Co. vs. *Connecticut Brass,* 290 Fed., 712;
Strain vs. *U. S. Fidelity & Guarantee Co.,* 292 Fed., 694; Aff'd 264 U. S., 570.

In the *Fisher* case it was pointed out that Congress has the power to provide for the payment of the debts of the Union, and is authorized to *create* a priority in the Government's favor in the exercise of its power to make all laws necessary and proper for carrying out the foregoing express power.

POINT II.

The United States obtains its priority, if any, from the Bankruptcy Act of 1898, and is bound by its provisions.

Under the Act of 1867, it was held in *Lewis* vs. *United States*, 92 U. S., 618, that the priority of the United States arose under an Act of 1797, now Revised Statutes 3466, and that the priority created by the Bankruptcy Act was simply a precaution to reaffirm the priority of the Government in bankruptcy proceedings.

Under the Act of 1898, however, it has been held that the United States is bound by the provisions of the Bankruptcy Act, and that whatever priority it has for the payment of its ordinary debts, must be created by that Act. It was for that reason that the Circuit Court of Appeals held in *U. S.* vs. *Wood*, 290 Fed., 109, and that this Court concurred (263 U. S., 680), that the plenary suit in equity to charge the assets for a debt due the United States could not be maintained by virtue of R. S. 3466 under the Act of 1898 although it could be maintained under the 1867 Act.

In *Guarantee Co.* vs. *Title Guaranty Co.*, 224 U. S., 152, the question was whether a surety subrogated to the rights of the United States was entitled to a priority over a labor claim. It was decided in the court below, 174 Fed., 385, that the United States was not bound by the provisions of the Bankruptcy Act and that under the Act of 1797 (now Revised Statutes 3466) the Government was entitled to a prior payment irrespective of the provisions of the Bankruptcy Act. This Court reversed these conclusions and held that the present act evidenced a different intention. In order to determine whether the United States was mentioned in the Bankruptcy Act of 1898 and therefore bound by the provisions of Section 64 as to priorities, the Supreme Court points out three pro-

visions indicating that the United States was intended to be included within the Act:

Sec. 1, subdiv. 9, that a creditor shall include anyone who owns a demand provable in bankruptcy;

Sec. 17, that a discharge in bankruptcy releases the bankrupt from all of his provable debts except such as are due as a tax levied by the United States, and

Sec. 57-J, providing that debts owing to the United State as a penalty or forfeiture shall not be allowed except for the amount of the pecuniary loss sustained by the act, transaction or proceeding out of which the penalty arose.

After comparing the provisions of the Acts of 1867 and 1898 and indicating other changes, this Court says:

> "The Act [of 1898] takes into consideration, we think, the whole range of indebtedness of the bankrupt, national, state and individual, and assigns the order of payment."

The Court accordingly concludes that despite the provisions of Section 3466 of the Revised Statutes, granting a priority over all claims, the United States claim for an ordinary debt is, because of the provisions of Section 64, to be paid after a labor claim.

This decision left open the question what priority the United States did have upon allowance of a debt due it as distinguished from a tax and primarily the question left open was whether the United States itself, within the meaning of Subdivision 5 of Sec. 64, was a "person" who by the laws of the United States was entitled to priority and therefore entitled to priority over general creditors.

Therefore, there remains simply the question whether or not the Bankruptcy Act of 1898 does in fact create a priority in favor of the United States for ordinary debts. Concededly, it does not create such a priority in so many words. The narrow question is whether under the provisions of 64b (5) a debt due the United States is a debt

due a "person," so that it is entitled to priority, because such priority is created by a "law of the United States," to wit: R. S. 3466.

POINT III.

The Bankruptcy Act of 1898 contains no express grant of priority to the United States eo nomine for an ordinary indebtedness, and the history of that act and of the earlier Bankruptcy Acts shows that the word "person" as used in Section 64 of the present act includes only private creditors and was not intended to include the United States itself; and therefore that R. S. 3466 is not incorporated into the act by reference.

In Matter of Eastern Shore Shipbuilding Co., 274 Fed. 893, decided in the Circuit Court of Appeals for the Second Circuit Court in June, 1921, the question was whether a claim of the Fleet Corporation was entitled to priority in bankruptcy. The Trustee urged first: that the Fleet Corporation was not entitled to whatever priority the United States itself might have because it was merely a private corporation, and second: that if it was entitled to all the rights of the United States, the United States itself had no priority for an ordinary debt in bankruptcy. Both points were argued at length by the Trustee. That Court pointed out that the question as to the priority of the United States itself apparently never had been determined, and found that it was not necessary to determine it because the Court held that the Fleet Corporation was a private corporation and an independent contractor.

and therefore the debt was due to it and not to the United States.

On March 15, 1922, *Matter of Eastern Shore Shipbuilding Co.* (*supra*) was argued in this Court together with the *Sloan Shipyard* case and the *Astoria Marine Iron Works* case, the two latter cases involving the question of whether the Fleet Corporation could be sued other than in the Court of Claims, 258 U. S., 549. On the argument before this Court counsel for the Trustee* of the Eastern Shore Shipbuilding Co. argued at length that even if the Fleet Corporation were a governmental agency, the United States itself was not entitled to priority, and the argument was answered in the Government's brief. Most of the argument now presented was presented in that case. Six of the Judges were of opinion (258 U. S., 549) that the Fleet Corporation was not a governmental agency and therefore held in the *Sloan* case and in the *Astoria* case that suit would lie and in the *Eastern Shore* case that there was no priority. Chief Justice Taft and Justices Van Devanter and Clarke concluded that the Fleet Corporation *was* a governmental agency, and therefore they dissented from the conclusions in the *Sloan* and *Astoria* cases. They were able to concur, however, in the conclusion in the *Eastern Shore* case (258 U. S., at top 574) because they agreed with the Trustee's second contention that the statute as to preferences in bankruptcy does not extend to claims of the United States, except those for taxes.

Chief Justice Taft said (258 U. S. at top of p. 574):

> "As to the preference claimed against a bankrupt in No. 625 by the Fleet Corporation, I concur in the conclusion of the court that it can not be allowed under the statute as to preferences in bankruptcy, because I do not think it extends to claims of the United States except those for taxes."

*Counsel for the Trustee in that case was the same as in the case at bar.

It is important to note that the judgment of the three concurring justices was not a mere casual one, but was the determination of a question deliberately raised and argued. It is also important to note that that opinion is neither a dissenting opinion nor a dictum but an absolute holding in an opinion concurring with that of the majority of the Court so far as the *Eastern Shore* case was concerned. If the *Eastern Shore* case had been argued along it would have been termed a concurring opinion.

It is impossible to construe the Act of 1898 without a consideration of the earlier Bankruptcy Acts and the history of the bills which led up to the enactment of the present Act. They were examined by this Court in the *Title Guarantee* case, 224 U. S., 152, and in *Schall* vs. *Camors*, 251 U. S., at 250.

These are presumed to have been before Congress when it considered the present Act.

It is believed that this examination will show:

(*a*) That the Bankruptcy Acts of 1800, 1841 and 1867 in so many words reaffirmed and continued the priority created by the Statute of 1797, now 3466 R. S.

(*b*) That the Acts of 1841 and 1867, by separate provisions, in addition to such reffirmation of Government priority provided for the priority of "persons"; i. e., private creditors, who by the laws of the United States were given such priority.

(*c*) That the *bills* leading up to the final enactment of the Act of 1898 did not reaffirm or create a priority for *all* debts but expressly limited the Government's priority to debts to the extent that they constituted a lien, and separately *continued* the provision for the priority to persons who by the laws of the United States were entitled to priority which provision was in the earlier

acts and *added* a priority for persons entitled thereto under State laws.

(*d*) That the Committee Reports and Explanations to the House supports petitioner's contentions.

(*e*) That the Act of 1898 as finally enacted did not reaffirm or create a priority for *all* debts but substituted for the priority for debts which constituted a lien as contained in the preliminary bills a priority for and a direction to pay all *taxes* whether or not they constituted a lien leaving undisturbed the priority to "persons," i. e., private creditors, who were entitled to priority under the laws of the United States by the terms of the Act of 1867 and extended the latter priority in favor of persons entitled to priority under State laws.

The various earlier bankruptcy acts and the bills and reports heading up to the Act of 1898 will now be examined.

The Bankruptcy Act of 1800.

Prior to 1800 Congress had not exercised its delegated power to pass a bankruptcy act, but it had provide by Section 5 of the statute of March 3, 1797 (1 Stat. 512), as follows:

> "And be it further enacted, that where any revenue officer, or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend, as well to cases in which a debtor not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor, shall be

attached by process of law, as to cases in which an act of legal bankruptcy shall be committed."

The act of bankruptcy therein referred to evidently referred to acts under State statutes.

The first Bankruptcy Act passed in 1800 provided (2 Stat., 19, 36):

> "And be it further enacted, That nothing contained in this law shall in any manner affect the right of preference to prior satisfaction of debts due to the United States as secured or provided by any law heretofore passed, nor shall be construed to lessen or impair any right to, or security for, money due to the United States or to any of them."

This provision was construed in *United States* vs. *Fisher*, 2 Cranch, 358, where the Court held that the purpose of the foregoing provision was simply to continue in a Federal bankruptcy proceeding the priority which had been granted to the United States by the Statute of 1797.

Thus the Act of 1800 did not itself *create* a priority for the United States, nor did it create any priority for private creditors who might be accorded preference under the laws of the United States or of the States.

The Bankruptcy Act of 1841.

This Act, 5 Stat., 440, 445, provides:

> "SEC. 5. And be it further enacted, That all creditors coming and proving their debts under such bankruptcy, in the manner hereinafter prescribed, the same being bona fide debts, shall be entitled to share in the bankrupt's property and effects, pro rata, without any priority or preference whatsoever, except only for debts due by such bankrupt to the United States, and for all debts due by him to **persons, who, by the laws of the United States, have a preference,** in consequence of having paid monies as his sureties, which shall be first paid out of the assets; and any

person who shall have performed any labor as an operative in the service of any bankrupt shall be entitled to receive the full amount of the wages due to him for such labor, not exceeding twenty-five dollars. Provided, That such labor shall have been performed within six months next before the bankruptcy of his employer." * * *

In this act is found for the first time the phrase which is the basis of the Government's claim and which has been repeated in all subsequent acts.

This Act, it will be noted, provided that the creditors proving their debts should be entitled to no prority except (1) debts due to the United States, (2) debts due to persons who by the laws of the United States were entitled to a preference in consequence of having paid money as sureties and (3) to wage earners for amounts not exceeding $25.00. In other words, there priority was expressly granted to the United States for its debts, and *in addition* priority was granted to persons who under the laws of the United States were subrogated to the rights of the United States under the Statute of 1797, now R. S. 3468, and also to a limited class of wage earners. *It is entirely clear, therefore, that under this Act of 1841, the word "persons" did not include the United States itself.* It is also to be noted that there was no priority granted to private creditors of the bankrupt other than sureties, even if granted priority under the laws of the United States or of the States. This provision of the Act does not seem to have been interpreted and the Act itself was repealed in 1843.

The Bankruptcy Act of 1867.

This Act (March 2, 1867), 14 Stat 530, C. 176, indicates clearly that Congress had in mind the distinction between ordinary debts due to the United States, moneys due as taxes and assessments, claims of wage earners, and also debts due to all persons, i. e., private creditors, who by

the laws of the United States were or might be entitled to priority. In Section 28 of that Act it was provided as follows:

> "In the order for a dividend, under this section, the following claims shall be entitled to priority or preference, and to be first paid in full in the following order:
>
> FIRST.—The fees, costs and expenses of suits, and the several proceedings in bankruptcy under this act, and for the custody of property, as herein provided.
>
> SECOND.—All *debts* due to the *United States, and* all *taxes* and assessments under the laws thereof.
>
> THIRD.—All debts due to the State in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws of such state.
>
> FOURTH.—Wages due to any operative, clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy.
>
> FIFTH.—All debts due to any *persons*, who by the laws of the United States, are or may be entitled to a prority or preference, in like manner as if this act had not been passed; always provided, that nothing contained in this act shall interfere with the assessment and collection of taxes by the authority of the United States or of any State."

Here is a clear recognition of the distinction between debts and taxes due to the United States and debts due to "persons" who by the laws of the United States were or might be entitled to priority. *It needs no argument to show that in view of the fact that there was an express provision with respect to debts and with respect to taxes*

due to the United States in subdivision 2nd, that the words "debts due to any persons" in sub-division 5 was not intended to include debts due the United States itself.

The word "persons as used in sub-division 5 included sureties who were subrogated to priority under the Statute of 1797, now R. S., Section 3468. It also included any other persons who might be entitled to priority under the laws of the District of Columbia, or under the laws of any territory for there is no limitation as in the Act of 1841 to "Persons" who are entitled to priority in consequence of having paid monies as the bankrupt's sureties.

In *Lewis* vs. *United States*, 92 U. S., 618, this Court considered the relation between the above provision of the Act of 1867 and the Statute of 1797, and the Court said, with respect to the priority of the United States itself, after quoting Section 28 of the Act of 1867:

> "The clause above quoted is in *pari materia* with the several acts giving priority of payment to the United States, and was doubtless put in to recognize and reaffirm the rights which those statutes give, *and to exclude the possibility of a different conclusion.*"

It is clear, therefore, that under the Act of 1867 Congress, as it had done in each of the prior Acts, expressly reaffirmed the priority of debts due the United States over all indebtedness. In addition it extended and created priority in favor of certain "persons," that is to say, in favor of certain private creditors, whose claims were thus preferred after the debts of the United States and certain other indebtedness.

Certainly in the light of the holding in the Guarantee case, 224 U. S., 152, that there was a change of purpose, and that the act takes in consideration all of indebtedness of the bankrupt and in the light of the continued policy of Congress in the three earlier bankruptcy Acts speci-

fically to reaffirm or recreate in bankruptcy the priority of debts due the United States over the debts due private creditors and separately to provide for the priority of certain "persons," it cannot be presumed that when Congress copied into the Act of 1898 the provision granting a priority to debts due certain "persons" and deliberately omitted in the final enactment of the statute a priority for the debts due the United States, expressly limiting the priority to taxes, that it was intended by mere implication to extend the meaning of the word "persons" copied from the earlier acts to include not only private creditors but also the United States itself.

The Act of 1898.

The Act of 1898 worked a radical change not only in the specific preference accorded by the earlier Acts, but it made numerous references to the United States by name and made exact provision for its status and its rights arising from all classes of claims. It provided that a discharge should not discharge tax claim and indicated its purpose that the bankrupt was to be *discharged from provable debts* owing to the United States except for taxes. (See *United States* vs. *Wood*, 290 Fed., 109-115). It provided that debts owing to the United States as a penalty should only be allowed for the amount of the pecuniary loss. It specifically provided a priority for taxes but *omitted* the priority for debts which had been reaffirmed in the earlier Acts, although it did specifically provide, as above stated, for the discharge of such debts.

An analysis of the Act of 1898 shows the following: Section 17 provides:

> "(*a*) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a *tax* levied by the United States, the State, county, district or municipality in which he resides."

Section 57J provides as follows:

> "*Debts* owing to the United States, a State, a County, a district or a municipality as a penalty or forfeiture shall not be *allowed*, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law."

In the foregoing provisions is found a distinct recognition of the existence of three classes of claims of the United States:

(A) Taxes;

(B) Debts owing as penalties;

(C) Debts generally.

Furthermore, debts owing to the United States are referred to in Section 57 and debts due any *person* entitled to preference by the laws of the United States are referred to in Section 64.

Having thus clearly indicated an intention that all classes of debts due the United States in bankruptcy are within the purview of and subject to the provisions of the Act, Congress in Section 64 provided for certain priorities.

In that Section again there is a clear distinction between taxes and debts. The order of priority is provided for as follows:

(*a*) All *taxes* due and owing to the *United States*, the State and political subdivision.

(*b*) Cost to preserve the estate.

(*c*) Filing fees and expenses of creditors who have recovered assets.

(*d*) Cost of administration.

(*e*) Wages.

> (*f*) Debts owing to any *person* why by the laws of the States or the United States is entitled to priority.

Reading the Act alone, it appears that Congress had in mind the various classes of debts due to the United States and deliberately determined just what indebtedness of the bankrupt should be entitled to prior payment and that it concluded that ordinary debts due the United States should not be given such a priority and should be allowed and discharged as private debts.

It is apparent, therefore, that the whole claim to priority is bottomed upon the proposition that despite these explicit provisions and references to the United States, and despite the deliberate omission of any specific provision for priority for ordinary debts, Congress by implication intended to create such priority by extending the meaning of the word "persons" to include the United States, although the same phrase in earlier acts clearly referred solely to private creditors, and that that extension of meaning was effectuated solely by means of the ambiguous definitions of terms used in the Act.

It now will be shown that the history of the Act of 1898 negatives any such intention and affirmatively shows that the intention was to the contrary.

History of the Act of 1898.

For some years prior to 1898, there was an agitation for the enactment of the Bankruptcy Law. A bill was drawn by Judge Torrey, which was introduced in the House in the early '90s and considered at successive sessions of Congress.

The Bill in 52nd Congress.

On June 27, 1892, the House Committee reported favorably on the Torrey Bankruptcy Bill (H. R. 9348, 52nd Congress, 1st Session). The Committee's report is House Report 1674 of that Congress and is found in Congressional Series No. 3048, House Reports No. 1674. That bill so reported by the Judiciary Committee provided as follows:—

> SECTION 64. (*a*) DEBTS WHICH HAVE PRIORITY.—Debts owing to the United States, a State, or municipality, after being proved and allowed shall have priority only in the event and to the extent that they constitute a lien upon the property of the estate.
>
> (*b*) The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of the payment shall be (1) the filing fees paid by creditors in involuntary cases; (2) the cost of administration, including one reasonable attorney's fee, for professional services actually rendered irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases and to the bankrupt in voluntary cases, as the court may allow; (3) wages due to workmen, clerks or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and (4) debts owing to any person who by the laws of the States or the United States is entitled to priority."
>
> (*c*) [This is a provision for expenses incurred in good faith in cases where compositions are set aside.]

Clearly under this bill there was no intention to include an ordinary debt due the United States not a lien within the provisions of Subd. (b) (5), nor to include within the word "persons" the United States itself, for

there was an express provision in Subdivision A relating to debts owing to the United States, which provided that after being proved and allowed, such debts should have priority *only in the event and to the extent that they constitute a lien.* As the bill expressly mentioned "Debts owing to the United States" and limited their priority to a specific class of debts, it is not believable that Congress intended by implication to provide for another class of debts owing to the United States in Subdivision 5 and made such provision simply by extending the meaning of the word "persons" to include the United States, although that word in the prior acts clearly referred only to private creditors. *If that had been the intention a separate subdivision would have been inserted providing for priority for ordinary debts.*

The Bill in the 54th Congress.

Again in the 54th Congress, 1st Session, the House Judiciary Committee favorably reported a bill introduced by Speaker Henderson (H. R. 8110), which contained practically the same provisions as the bill above referred to. (See House Report 1228, 54 Congress, 1st Session, Congressional Record for that Session, p. 3931). In that bill thus favorably reported Section 64 read as follows:

Section 64: Debts which have priority.

> (*a*) Debts owing to the United States, a State, a county, a parish, or a municipality, after being proved and allowed, shall have priority only in the event and to the extent that they constitute a lien upon the property of the estate.
>
> (*b*) The debts to have priority except as herein provided, and to be paid in full out of bankrupt estates and the order of payment shall be:
>
> (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases; (3) the cost of administration, including the fees and mileage payable to witnesses as now or

hereafter provided by the laws of the United States, and one reasonable attorney's fee for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while preparing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority.

This bill differed from Judge Torrey's bill only in that the priority was extended to debts owing to a county and a parish in addition to those owing to the United States, a state or a municipality. Here again, however, it is entirely clear that debts owing to the United States were provided for in Subdivision "a" and priority allowed only in the event and to the extent that they constituted a lien upon the property of the estate.

55th Congress.

In April, 1897, a similar bill was reported by the Senate Judiciary Committee. The bill, as reported, contained the following (Cong. Record, 55 Congress, 1st Session, pp. 601-609):

SECTION 65: Debts which have priority

(*a*) *Debts* owing to the United States, a State, County, Parish, being a political corporation, District, or Municipality, after being allowed, shall have priority *only in the event and to the extent that they constitute a lien upon the property of the estate.*

(*b*) (1, 2, 3 and 4 are like the present Section 64). "5. Debts owing to any *person* which by the

laws of the United States or a State ar entitled to priority."

This bill differed from the House bill in that it inserted after the word parish, "being a political corporation."

Senator Nelson's Substitute Bill, 55th Congress.

The bill was not enacted as reported but Senator Nelson on April 22, 1897, offered a substitute bill which passed the Senate on that day. That bill provided as follows (Cong. Rec., 55 Congress, 1st, Session, p. 800):

"SEC. 9. That the following debts shall have preference in the order named over other debts in the distribution of the estate of the bankrupt, to wit:

FIRST.—Debts due to servants and laborers employed by the bankrupt for labor performed or services rendered within six months prior to the filing of said petiton.

SECOND.—Taxes or revenues due the United States.

THIRD.—Taxes due any State or Territory or the District of Columbia.

FOURTH.—Taxes due any county, parish, etc.

But none of such debts shall be recognized or paid unless duly proved and allowed as prescribed in reference to other debts and claims against the bankrupt."

This bill, it will be noted, extends the priority from debts, which are a lien, to all taxes, *but does not purport to create any priority for ordinary debts due the United States or for debts due persons.*

Final House Bill, 55th Congress.

That bill was referred to the House Committee. That Committee recommended that the enacting clause of the Senate Bill be stricken out and in lieu thereof it recommended another bill which was in essence similar to H. R. 8110 introduced in the First Session of the 54th Congress, which bill is referred to above, except that changes were recommended in the priority clause. The bill as proposed by the Committee contained the same provisions as were eventually contained in the bill which became a law. The House Judiciary Committee Report, report No. 65, 55th Congress, 2nd Session, was presented December 16, 1897.

Committees Report as to Changes.

In discussing the changes in H. R. 8110 of the 54th Congress which were recommended, the Committee said at page 27 of its report with respect to the proposed changes in Section 64:

> "Under the head of debts which have priority, a provision is recommended requiring trustees to recognize first taxes due to the United States, State, County, District or Municipality, to be paid before any dividend is paid to creditors. This to apply whether the taxes are a lien or not upon property."

That is to say, the Committee recommended that instead of the provision that there should be priority for debts owing to the United States only in the event and to the extent that they constitute a lien upon the property of the estate, there should be a direction to the trustee to pay taxes, whether or not they were a lien. This was an extension of the Government priority as contained in the earlier bill, for under Section 3186 of the Revised Statutes

then in force, taxes only become a lien after notice of the assessment was filed in the Collector's office and a demand was made.

From the foregoing, it is apparent that the intention was to prefer only indebtedness due the United States which arose by virtue of the exercise of the taxing power and not indebtedness which arose out of contractual relations. Nowhere is there any indication of any intention to create a priority for ordinary contractual debts or any intention to reaffirm the priority which might exist under the Statute of 1797, now R. S. 3466, as was done in all the prior acts.

Mr. Henderson's Explanation to the House.

This is further confirmed by the explanation of the bill made by Mr. Henderson, Chairman of the Judiciary Committee on the floor of the House. He said (Cong. Record, 55th Congress, 2nd Session, p. 1787, at top):

> "Debts which shall have priority are the actual costs of preserving the estate, the filing fees paid by creditors, the cost of administration, wages due workmen, clerks, or servants which have been earned within three months, not to exceed $300 each, and debts owing any person who by the laws of the States or the United States is entitled to priority."

The Chairman did not read the definitions contained in the bill to the House; he did not say that the term "any person" included sovereign corporation or the States or the United States or had other than its ordinary meaning. Clearly he did not have or intend to convey the thought to the House that under this provision debts due the United States were preferred. His explanation is of controlling importance and is most persuasive evidence that the word "person" was used in the Act of 1898 in its ordinary sense as it was in the

earlier acts, namely, to designate private creditors of the bankrupt.

The bill thus explained passed the House and went to the Senate. Thereafter a conference committee agreed upon a bill which contained the same provision as in the House bill (Senate Document 294, 55th Cong., 2nd Session) and this bill became a law.

Summary of Historical Review.

From the foregoing discussion the following appears:

(*a*) The Act of 1800 specifically preserved the priority created by the Statute of 1797 and created no priority for persons, i. e., private creditors.

(*b*) The Act of 1841 again preserved or created a priority for debts due the United States *and in addition* created a priority for two classes of "persons", i. e., for private creditors who had priority under the laws of the United States as sureties for debtors of the United States, and for wage earners.

(*c*) The Act of 1867 "reaffirmed" in bankruptcy the priority granted by the Statute of 1797, and in addition *extended* the priority in bankruptcy to *all* persons, i. e., private creditors as were or might be entitled to priority under the laws of the United States thus including not only sureties but priority claimants under the laws of the District of Columbia and of the territories and any persons to whom priority might be granted thereafter by any Federal statute.

(*d*) The bills in Congress leading up to the Act of 1898 eliminated the priority for all debts due the United

States and preferred "Debts owing to the United States," only in the event and to the extent that they constituted a lien and by separate provision continued and extended the priority in bankruptcy to persons, i. e., private creditors so as to include creditors entitled to priority not only under the laws of the United States *but also under the laws of the States.*

(*e*) The Act of 1898 as passed limited the priority to taxes whether or not they constituted a lien. This Act also discharges debts due the United States other than taxes and provides that debts for penalties are to be allowed only for the actual damage sustained, thus indicating that sovereign rights existing under the Act of 1867 were eliminated.

Conclusions from Historical Review.

In *Guarantee Co.* vs. *Title Guaranty Co.*, 224 U. S., 152, this court said:

> "And we cannot say that it was inadvertent. The act takes into consideration, we think, the whole range of indebtedness of the bankrupt, national, state and individual, and assigns the order of payment."

As these changes were not inadvertent and the Act takes into consideration the whole range of indebtedness of the bankrupt, national, state and individual, and assigns the order of payment, and as ordinary debts are discharged the intent of Congress is clear to curtail the rights of the Government and upon ordinary debts to place the Government upon the plane of an ordinary citizen. *If the intention had been to give it priority for ordinary debts as distinguished from taxes, it is not conceivable that the draftsmen of the Torrey bill and*

the subsequent bills which led to the enactment of the Act of 1898 would have deliberately removed from the Act of 1867 the express priority for debts due the United States contained in Section 28 of the Act of 1867, and first would have limited such priority to "debts" which are a lien and finally to taxes. If the intention was to continue the priority and make it subordinate to wage claims, the language of the Act of 1867 would not have been eliminated and so important a right would not have been allowed to rest upon ambiguous definitions and implications. On the contrary, a separate sub-division with respect to ordinary debts due the United States would have been inserted.

The draftsmen of the Act of 1898 were, of course, familiar with the decision in the *Lewis* case, 92 U. S., 618, which held that the express priority for debts was inserted in the Act of 1867 to recognize and reaffirm the rights created by the Statute of 1797 *"and to exclude the possibility of a different conclusion."* Knowing, therefore, that there was this possibility of a "different conclusion," what possible reason could there be for Congress deliberately to fail to recognize or create the priority for the United States *in so many words* as was done in the 1867 Act? Why should the express priority of the Act of 1867 have been eliminated unless Congress intended to eliminate the right itself?

It now will be shown that the definitions contained in the act and the application of the provisions of Section 64 do not forbid the adoption of the foregoing conclusion as suggested by the Referee and by the opinions in the *Tidewater* case.

POINT IV.

A.

The Act of 1898 despite the definitions therein contained is not free from ambiguity as to the status of debts due the United States and therefore the prior acts and the history of the Act of 1898 can be resorted to for the purpose of resolving the ambiguity.

B.

The reasoning in the Tidewater case is not controlling.

"A."

The Referee held that the Act of 1898 in the light of the definitions therein contained was so free from ambiguity that resort could not be had to the prior acts and to the history of the Act of 1898 to determine the question presented.

Section 1a of the Bankruptcy Act provides as follows:

> "The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows * * *
>
> (6) 'Corporations' shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under the laws making the capital subscribed alone responsible for the debts of the association.
>
> (19) 'Persons' shall include corporations, except where otherwise specified, and officers, part-

> nerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers and members of the board of directors or trustees, or other similar controlling bodies of corporations."

Definitions contained in an act are themselves subject to construction by the courts, like all other parts of an act. They should not be extended beyond their necessary import nor should they be allowed to defeat the intention of the legislature. If these definitions specifically provided that the term "person" should include the United States or a State there would be no room for construction. Because they do not so provide, because they are to say the least ambiguous and because the clear intention of Congress in enacting Section 64 in its present form has been shown to be to eliminate priority for debts due the United States, the definitions by strained construction cannot be permitted to thwart the legislative intent.

As said by Mr. Justice BUTLER in *Barrett* vs. *Van Pelt* decided April 13, 1925.

> "Being satisfied of the legislative intention, the Court will not be prevented from giving that intention effect by a too rigid adherence to the very word and letter of the Statute, *Oates* vs. *National Bank*, 100 U. S. 239, 244."

As pointed out by BLACKBURN, J., in *Lindsay* vs. *Cundy*, 1 Q. B.D. 348, 358 in construing definitions and their application the courts cannot close their eyes to the fact that the use of definitions in statutes is a comparatively modern innovation and frequently leads to confusion because definitions give a non-natural sense to words which are afterwards used in a natural sense without regard to the distinction. That principle is peculiarly applicable here for an attempt is being made to extend the

obvious natural meaning of "persons" as used in Section 64 and in prior acts to include the Sovereign.

Assuming that the United States is a corporation sovereign, it is submitted that the definition of corporations above set forth was not intended to include the United States, but by its very language was limited to private corporations, joint stock companies, limited partnerships or other partnership associations organized under the laws of the various states in all of which there was a right of succession and in some a limited liability of the members, as contrasted with powers and privileges and liabilities of individuals and partnerships. Congress, of course, realized that the laws of the various states differed in their terminology with respect to organizations which were not strictly private corporations and not the ordinary partnership and therefore used the language quoted to cover those classes of organizations of which the essential features were continuity and limited liability. In some states there is no limited liability of members of such organizations and in others the liability is limited to the capital subscribed. *In view of the fact that throughout the Act the States and the United States are referred to in haec verba it is not believable that Congress would have failed specifically to include the United States and the States in so many words it had intended that they or either of them should be included within the definitions just as certain partnership associations were thus included in the definition.* It is not believable that Congress would have left the rights of the United States or the States to be asserted by mere implication. Certainly it is a peculiar "judicial process" which leads to the conclusion that these definitions *without any doubt* include the United States and therefore eliminates the possibility of examining the history of the legislation and the Act as a whole as an aid in construing what must certainly be considered at least an ambiguity as to the scope of

the defintion and as to whether the definition is inconsistent with the context.

As above indicated in numerous places throughout the Act, Congress has referred to the United States by name and specifically in Section 64 has created a priority for the United States and the States for taxes. Consequently the failure of Congress *in so many words* to create a priority for ordinary debts in the very section which specifically creates such a priority for taxes is most persuasive evidence of Congressional intention that the priority for debts should no longer exist. And yet the Referee finds not the slightest ambiguity or doubt and by a most technical application of definitions and without regard to the context of the very section, he has determined that no reference can be made to the prior Act and their interpretation by the Courts and to the history of the particular Act under construction.

An examination of the Act as a whole shows the use of the word "person" time and again under circumstances, where it is entirely clear that no sovereign corporation was intended to be included and where the intention was to include only natural persons, strictly private corporations and those bodies which possessed some of the attributes of a partnership and some of a private corporation. For example:

Section 2, subdivision 16 provides that the court of bankruptcy has power to punish "persons" for contempt.

Section 3 (a) provides what acts of bankruptcy by a "person" shall consist of.

Section 3 (b) provides that a petition may be filed against a "person" who is insolvent and who has committed an act of bankruptcy.

Section 3 (d) provides that whenever a "person"

against whom a petition is filed denies the allegations of insolvency, he shall appear on the hearing, etc.

Section 3 (e) provides that whenever a petition is filed by any person and a temporary receiver is applied for a bond shall be given.

Section 4 of the original Act of 1898 (30 Stat. 544) provided that any person, except a corporation, could become a voluntary bankrupt, and Section 4 (b) in the original Act provided that any natural person, except certain specified individuals and certain corporations engaged in certain lines of business, might be adjudged an involuntary bankrupt, and of course here there would be included not only a strictly private corporation, but also in pursuance of the definition bodies engaged in those lines of business having the attributes of a private corporation (such as joint stock associations and partnership asociations).

The present act as amended by the Acts of 1903 and 1910 extends the right to file a voluntary petition to any person *except* certain classes of corporations and extends the class of corporations against which petitions may be filed. As the United States and a State are not specifically excluded, under the reasoning of the Referee a State or the United States being corporations not within the excepted class could file voluntary petitions.

Section 16 (a) provides that the liability of a "person" who is a co-debtor with or guarantor for the bankrupt shall not be discharged.

Section 20 (b) provides any person conscientiously opposed to the taking of an oath may in lieu thereof affirm.

Section 29 in all its subdivisions provides that a "person" may be punished for offenses under the Act.

In the light of the foregoing, can it be argued that the court is bound to hold that there is no possible room for construction; that "persons" in 64 without doubt includes the United States and that it must shut its eyes to the history of the past and present acts in ascertaining the true intent of Congress in continuing the priority for "persons" which originated in the Act of 1841.

Of course, the primary question is what was the intention of Congress in Section 64 of the Act and this intention, it is submitted, cannot be ascertained by the process of reasoning to which the Referee has limited himself. Cases can be found construing some Statutes which hold that the word "persons" or the word "corporations" include the sovereign and on the other hand cases to the contrary are also in the books. Precedents on this question are not helpful inasmuch as the legislative intent with respect to each individual statute is controlling *and in the absence of a specific provision that the term "corporation" as used in this Act shall include the United States,* it is submitted that to arrive at the true Congressional intent the Court must examine the prior Acts and the history of this Act as an aid to arriving at the true construction. This was done by the Court in construing the Bankruptcy Act in the *Title Guaranty* case, 224, U. S., 152 and in *Schall* vs. *Camors,* 251 U. S., at 250.

As stated in *Davis* vs. *Pringle,* 1 F. (2d) 860, 863:

> "The failure to include the United State and the states in the definition could not have been inadvertent. The United States and the several states of the Union are not persons, and are not commonly thought of as persons, and if it had been intended that 'persons' should have such a comprehensive and unsual meaning as to include them, the framers of the definition would have said so.
>
> Again, when the Congress had already dealt with claims of the United States under the name of the

> United States, and had deliberately limited its priority to taxes, it is hardly reasonable to attribute to the Congress an intention to deal again with the claims of the United States and include them in a provision relating to debts of 'any person.' "

It is submitted that the Referee's view is a narrow and erroneous one and that it does *not* appear clearly from the definitions alone that the United States as a sovereign corporation is included in the terms "person," and that it does appear, inconsistent with the context of Section 64, to hold that the United States is included in the word "person." *In the absence of definitions which specifically include the United States or a state within the meaning of the word "person," the court must be free to examine the history of the legislation in order to ascertain the true legislative intent.* Such examination it has already been shown leads to the indubitable conclusion that no priority for ordinary debts due the United States was intended to be created by the Bankruptcy Act of 1898.

B.

The reasoning in the Tidewater case is not controlling.

In the *Matter of Tidewater Coal Exchange*, 280 Fed., 648 certiorari denied in *Davis* vs. *Coyle*, 260 U. S., 721, upon which case the decree below in the present case was based, the question presented to the District Court and to the Circuit Court of Appeals was whether the United States as a contract creditor was entitled to vote in the election of a trustee in bankruptcy. *Both parties conceded the priority,* but the United States claimed that the provision of the Bankruptcy Act which precluded private creditors with the priority from voting, did not apply to the United States. The District Court and the

Circuit Court of Appeals as a preliminary to the consideration of the question of the right to vote discussed the sources of the priority without having before it the argument now presented, and both courts held, in accordance with counsel's concession that the priority did exist and they found as its basis the provisions of Section 64 (b) (5) of the Bankruptcy Act.

In his opinion in the Circuit Court of Appeals, Judge Rogers stated, 280 Fed. at 650 that "if" under the Bankruptcy Act priority is given, it must be because of Section 64 (5) (b), and then added that the Court had no doubt that the United States was to be regarded as a person within the meaning of that clause. No reasons are advanced for the conclusion. The statement of the court that the statutory provision is "simply *declaratory* of the common law rule which entitled a sovereign to priority over all creditors of an insolvent" is inaccurate and can find no basis in the decision of *United States* vs. *National Surety Co.*, 254 U. S., 73, 75, which is cited in support of the statement. This court in that case said that Section 3644 *embodied* the common law rule, which is of course a wholly different thing and is quite in accord with the cases cited in Point I hereof to the effect that the Federal Government did not inherit the priority of the crown of England and that the right of the United States to priority is solely a statutory right created by Congress in the exercise of its delegated powers.

Of course, the question here presented was not discussed in the National Surety case (see discussion of this case in Point V) for there both parties evidently conceded that the United States had a priority in payment and the only question which the Court considered was whether a surety which paid part of a claim due the United States was as to that payment entitled to equal priority with the United States, which asserted a claim for the balance due.

In his opinion in the *Tidewater* case in the District

Court,* after quoting the language of Section 64 (b) (5) Judge LEARNED HAND said:

> "This language fits precisely because the United States is a corporation sovereign and corporation are 'persons' under Section 1 (*a*) (19)."

This syllogism, it is submitted, overlooks the fact however, that the act itself limits the word "corporations" in Section 1 (*a*) (6) to those there specified and there is certainly no precise indication in that definition that sovereign corporations were intended to be included as has already been shown at length.

Judge HAND further said in the *Tidewater* case:

> "Moreover so far as anyone has found it [the United States] is not only a 'person' but the only 'person' * * * entitled to priority under any law of the United States."

This statement, even if correct, leads to this conclusion: That although Congress must have known that no person other than the United States itself was entitled to priority under the laws of he United States, nevertheless instead of doing the obvious and natural thing namely, continuing a priority for the United States *eo nomine*, Congress created that priority in the United States by eliminating the express priority found in the earlier acts and by leaving the priority to be spelled out of so tortuous a phrase as "person who by the laws of the United States is entitled to priority," which phrase in the prior acts and bills as already shown clearly referred to private creditors.

It cannot be seriously argued that a priority was created by any such method.

It is submitted, however, that the statement that the United States itself is the only person entitled to pri

*The opinion is not reported but is found in the record in *Davis v. Coyle*, 260 U. S., 721 (October Term, 1922, No. 399).

ority under the laws of the United States, is, in fact, incorrect. By virtue of the provisions of Section 64 A of the Act, taxes are to be paid first, and included within the term taxes are not only income taxes and the like, but also duties imposed under the tariff acts.

Matter of Rosenthal, 235 Fed., 315.

Accordingly, it is clear that a trustee in bankruptcy under the provisions of Section 64 A is required first to pay any duties which may be owing by the bankrupt. If bonds have been given to secure the payment of duties and the sureties upon such bonds have discharged the obligation, then by the laws of the United States, to wit, R. S. 3468,* such sureties would be entitled to priority, but under the provisions of Section 64 (*b*) (5) would be entitled to priority only in advance of general creditors and after administration expenses and wage claims. In other words Section 64 (*b*) (5), modifies the general right of subrogation contained in R. S. 3468 so that the *surety* is not paid ahead of wage claimants although the tax which the surety paid would be paid ahead of such claimants if the tax were still due the United States.

Because of the definition of "States" contained in Section 1 (*a*) (24)* where that word is defined to include the territories and the District of Columbia the technical argument may be advanced that the priorities granted

*R. S. 3468 provides:

Priority of Sureties. Whenever the principal in any bond given to the United States is insolvent, or whenever, such principal being deceased, his estate and effects which come to the hands of his executor, administrator, or assignee, are insufficient for the payment of his debts, and, in either of such cases, any surety on the bond, or the executor, administrator, or assignee of such surety pays to the United States the money due upon such bond, such surety, his executor, administrator, or assignee, shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States; and may bring and maintain a suit upon the bond, in law or equity, in his own name, for the recovery of all moneys paid thereon.

*Section 1 (24) of the Bankruptcy Act provides:

"'States' shall include the Territories, the Indian Territory, Alaska, and the District of Columbia."

to persons by the laws of District of Columbia and of the territories are not granted by the "United States," but by the "States" so that the only persons who are entitled to priority under the laws of the "United States are sureties. It may well be doubted whether Congress in inserting the word "States" in 64 (*b*) (5) had in mind the definitions of States in Section 1 (*a*) (24) but even if it did it still remains true that sureties on bonds for import duties and other taxes would be entitled to priority. It is not true, therefore, it is respectfully submitted that there are no "persons" other than the *United States* now entitled to priority under the laws of the United States.

Whether Congress made this critical analysis is exceedingly doubtful* and the most reasonable assumption is that the *underlying purpose of the provisions was to preserve and continue whatever priorities existed to private creditors under the laws of the United States and to extend the right of priority to persons entitled thereto under the laws of the State.* It must be repeated that it is not conceivable that Congress deliberately omitted the express priority granted in the Act of 1867 and intended that the right to such priority should be spelled out of a series of ambiguous definitions and other provisions intended to grant priority to certain private creditors. No rules of statutory construction require such a conclusion and it will be shown in Point VI post that such construction is not required by a sound public policy as to the status of ordinary debts due the United States.

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*In Section 3 (*a*) 4 of the act there is a reference to the laws of "a State, of a Territory or of the United States," thus indicating how the definition of "States" contained in the act was overlooked.

POINT V.

The cases relied on by the Government in the courts below are not controlling upon the question here presented.

In *United States* vs. *National Surety Co.*, 254 U. S., 73, the interpretation of the Bankruptcy Act was in no wise considered. There a surety company paid part of a claim due to the United States and claimed the right under Section 3468 of the Revised Statutes to equal priority for the amount so paid with the United States, which was asserting priority for the balance due it from the bankrupt. Both sides assumed that the United States had a priority under Section 3466 and the only question was as to the relative rights of the Government and the surety. The *briefs* and the opinion in that case indicate that the question now presented for decision was neither raised nor decided. No reference was made to the provisions of Section 64 of the Bankruptcy Act, to the earlier bankruptcy acts, nor to the decision in the *Guarantee* case. Furthermore, in *United States* vs. *Wood* as trustee, 263 U. S. 680, the *National Surety* case was unsuccessfully urged as an authority to sustain the contention that the Government's priority arose under Section 3466 and that, therefore, a plenary suit in equity could be maintained to charge the assets in the hands of the trustee, just as it was sustained under the 1867 Act in *Lewis* vs. *United States*, 92 U. S. 618. This contention, however, was overruled, this court holding that the rights of the United States arose solely under the Bankruptcy Act itself. In the *National Surety* case, this court simply determined the relative rights of the Government and the surety under the Revised Statutes, *without being asked to and without in fact considering the effect of the Bankrupcty Act*

upon those provisions or upon the status of Government claims. That case, therefore, cannot be deemed as authority on the question here presented. As stated by Mr. Justice SUTHERLAND in the very recent case of *Webster* vs. *Fall*, 60 L.Ed., 174, 175:

> "The most that can be said is that the point was in the cases if any one had seen fit to raise it. Questions which lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."

2. In *Matter of Western Implement Co.*, 166 Fed., 576, affirmed on opinion below, 171 Fed., 81 (8th Circuit), it was held that a state was entitled to priority for an ordinary debt in bankruptcy.

It is important to note that Judge Van Devanter, who, as a Circuit Judge, concurred in the decision of the Circuit Court of Appeals, subsequently concurred in the opinion in this Court in the *Guarantee* case, and was one of the Justices of this Court in the *Eastern Shore* case, who concluded that the United States has no priority in bankruptcy. It is also important to note that the District Court in its opinion relied in part upon the decision in the *Stoever* case, 127 Fed., 394, the doctrine of which was subsequently overruled.

Irrespective of these considerations, it is apparent that the Court in the *Western Implement* case without regard to context or history, concluded that a person included a corporation and that a corporation included a sovereign, and referred to general definitions of corporations, which are not determinative of the meaning of words used in the Bankruptcy Act. Furthermore, the argument there advanced that most but not all of the states hold that a sovereign state has taken over the prerogative of the King of England to the prior payment of taxes and ordinary debts is not persuasive of the fact that Congress in 1898 in the light of the conditions then

existing did not determine that there no longer should be any priority in bankruptcy for ordinary debts whether due to a state or to the United States. In the earlier Acts, debts due a sovereign were not discharged in bankruptcy, and yet Congress in 1898 eliminated these rights of the Federal and State governments.

In view of these provisions, it is not difficult to conceive as the Court suggests that Congress intended to render nugatory the policy of priority to the extent of ordinary debts, and that this was accomplished by a mere failure to insert some express provision covering the subject. What more need Congress have done than to provide an express priority for taxes, omit the express priority for ordinary debts which was in the prior acts, preserve the rights of "persons" in the earlier acts and provide that the debts due the United States, the State or municipality should be discharged as ordinary debts. As stated by Judge Hand in his opinion in the *Tidewater* case, referred to above, the Act contains indications "that except in the matter of taxes, it was intended to put the United States in the same position as other creditors." The whole argument of the court in the *Western Implement* case is contrary to the later conclusions of this Court in the *Title Guarantee* case that Congress *did* intend to change the general priority of the United States and the States which existed under the Bankruptcy Act of 1867 and Revised Statutes 3466.

(3) *Matter of Hibner Oil Co.*, 264 Fed., 667. This case has been cited by various courts as holding that a debt due the United States was entitled to priority in bankruptcy. An examination of the case and of the briefs indicates, however, that priority was conceded and the only question was whether the Director-General was entitled to the Government's priority. At page 10 of the appellant's brief in that case, a copy of which has been examined by counsel, appears the following statement:

> "The appellant herein admits that contractual debts due to the United States of America are fifth in order of payment in a bankruptcy case, or have priority over general unsecured creditors, but the trustee contends, etc."

It was because of this statement that the court, in its opinion, said:

> "If the claim is property of and constitutes a debt due to the United States then concededly its priority was properly found."

(4) *In Re Stoever*, 127 Fed., 394 the Court reached the conclusion that the United States was entitled to priority over all creditors, including wage earners, and the reasoning of that case was followed by the Circuit Court of Appeals of the Third Circuit in the *Guarantee Company* case in 174 Fed., 385. Of course, the latter decision was overruled by this Court.

(5) *Lewis* vs. *United States*, 92 U. S., 618, was decided under the Act of 1867 and its doctrine has been held inapplicable to the Act of 1898, both in the *Guarantee* case and in *United States* vs. *Wood*.

(6) *In re Anderson*, 279 Fed., 525, involved the question whether the United States could be compelled to file its claim for taxes. It is entirely true that in this case there is a dictum that debts due the United States come after wages due workmen. But the statement was not necessary to the decision or was there apparently any consideration of the argument now presented.

(7) *United States* vs. *Oklahoma*, 261 U. S., 253, has no bearing whatever on the question here. In that case the only question was whether a debtor had been divested of his property in one of the methods specified in R. S. 3466, and the court held that as the debtor had not been so divested, the United States had no priority, because

the priority was the creation of statute and the case did not come within its terms. *The decision does show how strictly this court has construed the right to priority for over a century.*

POINT VI.

A failure of Congress to create a priority for ordinary debts due the United States is in accordance with an enlightened and desirable public policy and the Courts should not be astute to spell out an intent to the contrary. When the government descends to the role of the private citizen and enters into contract relations, the losses which it sustains in excess of its pro rata share of the assets should not be borne by the other creditors of the bankrupt but by all the people.

The reasons moving Congress no longer to give a preference to ordinary debts due the United States and to provide for their discharge in bankruptcy are entirely understandable.

The right of priority of the United States is wholly statutory and priority was given for the purpose of sustaining the public burdens.

In *United States* vs. *Bank of North Carolina*, 6 Peters, 29, 35, the Court said:

> "The right of priority of payment of debts due to the government, is a prerogative of the crown well known to the common law. It is founded not so much upon any personal advantage to the sovereign, as upon motives of public policy, *in or-*

der to secure an adequate revenue to sustain the public burdens, and discharge the public debts.

The first preference was given by the Statute of 1797. In those days, the Republic needed all moneys which it could obtain from any source to pay its debts and it was apparently deemed wise to secure prior payment of Government moneys no matter from what source they were due or for what reason, even at the expense of the private general creditors of the bankrupt; and so, throughout the earlier years of the country's history and at the close of the Civil War with its strain on government revenues, it was apparently deemed essential that the preference contained in the Statute of 1797 should be continued by the Act of 1867 and that the private creditor must sacrifice his rights of equality for the public good.

In 1898, a different condition prevailed. The nation was rich and prosperous. The need for sustaining the "public burdens" was not so pressing. Government activities and dealings with the ordinary citizens were increasing. The injustice of allowing priority to contract debts due the Government was patent. The absence of a national bankruptcy law had led to grave abuses and one of its underlying purposes was to provide for the equality of division of assets between creditors. Of necessity, the taxes must be preferred, for the Government must have its revenue for operation, but no apparent reason appeared at that time why the Governmen should be preferred in the payment of claims (to use the language of Justice McKenna in the *Guarantee* case, "growing out of personal conventions as distinguished from civil obligations." The Act expressly provides that all debts due the United States, except taxes, are discharged and that debts for penalties should not be allowed, except as indicated. Thus some of the old rights based on the notion of priority of the sovereign

are expressly eliminated. The obvious intention was that ordinary debts due the United States should be proved, allowed and in every respect should be subject to the provisions of the Act.

No reason can be advanced why this is not an enlightened and desirable public policy.

As early as 1805, Mr. Justice Washington in his dissenting opinion in *U. S.* vs. *Fisher,* 2 Cranch., 358, 402, rebelled against the construction of the Statute of 1797 which preferred the United States over private creditors on ordinary debts. He said:

> "The nature of the debt may well warrant a discrimination; but not so, if the privilege be merely of a personal nature. The sovereign may, in the exercise of his powers, secure to himself this exclusive privilege of being preferred to the citizens, but this is no evidence that the claim is sanctioned by the principles of immutable justice. If this right is asserted, individuals must submit; but I do not find it in my conscience to go further in advancement of the claim, than the words of the law, fairly interpreted, in relation to the whole law, compel me. But I do not think that Congress meant to exercise their power to the extent contended for. First, because in every other section of the law they have declared a different intent; and secondly, because it would not only be productive of the most cruel injustice to individuals, but would tend to destroy, more than any other act I can imagine, all confidence between man and man. The preference claimed is not only unequal in respect to private citizens, but is of a nature against which the most prudent man cannot guard himself. As to public officers, and receivers of public money of all descriptions, they are, or may be known as such; and any person dealing with them, does it at the peril of being postponed to any debt his debtor may owe to the United States, should he become unfortunate. He acts with his eyes open, and has it in his power to calculate the risk he is willing to run. *But if*

this preference exists in every possible case of contracts between the United States and an individual, there is no means by which any man can be apprised of his danger in dealing with the same person.''

The Statute there under consideration expressly created a priority for *all* debts and therefore it forbade the construction for which Judge WASHINGTON contended.

How much truer were his words in 1898. Then the government was a contractor and a buyer in the chief centers of the country. The business relations of the Government with its citizens have increased enormously since that time through its various agencies, departments and enterprises, and the smallest merchants find themselves in contractual relation with the government. In view of this situation, did not Congress deliberately omit the preference of the Government's ordinary debts, because it was believed that when the Government contracted with the ordinary citizen, it should have no greater or other rights than other contractors or creditors of the persons with whom it might deal? If the contrary be the law, then in these days of Government activities, no one can safely give credit to any mercantile concern which has Government contracts. For if bankruptcy ensues the entire assets may be payable to the Government as damages and the private merchants will receive nothing.

That this happens in numerous cases where there are *tax* claims is known to all. In the past few years there have been many cases in which tax claims first asserted after bankruptcy have consumed all assets remaining for distribution. The hardship ensuing to ordinary private creditors should not be extended at this time when the Government is asserting enormous contract claims growing out of its wartime operations. Judge Hand in his opinion in the District Court in the *Tidewater* case

has recognized the soundness of this view in his discussion of the rule as to whether statutes apply to the United States, for he says:

> "It is especially inapplicable when governments enter into commerce, as here, or industry, and assume duties and obligations and acquire rights and interests under exactly the same rules as private persons. Surely it is intolerable in such cases that the community at large having undertaken collectively the role of a private association should assert privileges, immunities and exemptions to which no one similarly situated is entitled and which, so far as they have any justification whatever, depend upon ideas long since obsolete and derived from a totally different conception of the relations of the individual to the ruler."

By the recent decisions in the *Oklahoma* case, 261 U. S., 253, and *Equitable Trust* vs *Connecticut Brass Co.*, 290 Fed., 712, the priority of the United States for ordinary debts in distribution in equity receivership and the like has been denied and Congress has not amended the statute—R. S. 3466.

In *Davis* vs. *Pringle*, 1 Fed. (2d) 860 at 864, the Circuit Court of Appeals said:

> "No sound principle of public policy can be invoked in support of preference to the federal government and to the states over citizens in the collection of ordinary debts. On the contrary, the contractual operations of the federal government and of the states have become so extensive and so involved with the business of private citizens that priority to the federal government and to the states, except for taxes, would operate as an oppressive hardship on other creditors of bankrupts."

In *Davis* vs. *Michigan Trust Co.*, 2 F. (2d) 194, 197, the Court said:

> "Judicial opinion as well as legislation is examining anew the proper privileges and immunities to be accorded the sovereign State, and in cases not clearly covered by Statute or decision, the correct solution is not to be found by the application of an abstract formula, but by the most careful consideration of the public needs and the practical requirements of law in the modern industrial community."

In *McPhee* vs. *U. S.*, 62 Colo., 421, cited with approval by this Court in *U. S.* vs. *Wood*, 290 Fed., 109 the Court in holding that debts other than taxes due the United States were discharged in bankruptcy said:

> "The United States, when it engaged in business enterprises should be subject to the same laws and occupy no different position than individuals when so engaged."

The argument of the Government that the claim of the Postmaster General arises out of the performance of purely governmental function and therefore as a matter of public policy the claim should be preferred just as a tax claim, of course, does not bear analysis. Every claim must be one or the other. *Either the United States has a priority for all claims growing out of a contract or it has priority for none.* The courts cannot prefer one contract claim and disallow preference to another.

Upon what possible theory of public policy should the United States, as the purchaser of a draft from international bankers, as in the present case be preferred over the ordinary citizen who has made a similar purchase? Upon what possible theory of public policy under present conditions should the United States be paid in full and the loss be borne by the private creditors? Profits from Government operations belong to all the people; losses should be borne by all. In any case in which the United States is a contract creditor, the debt has been incurred in the performance of some governmental func-

tion, in pursuance of the direction of Congress, and whether it be the purchase of a draft or the operation of a ship or the purchase of supplies, the essential fact is that the *United States has descended to the role of an ordinary citizen and divested itself of its sovereign character* and should not have its obligation paid at the expense of others who have dealt with the same common debtor.*

The bankruptcy act is founded on equitable principles and one of the elementary principles is that equality is equity. There is no apparent reason why that principle should not now apply to the status of debts due the United States and debts due private creditors of a bankrupt debtor.

It is submitted that this Court should now hold that by the very language of the Act of 1898, in the light of its history, and from considerations of sound public policy Congress has determined that the early rule should no longer obtain, that the Act of 1898 is all inclusive, and that debts due to the Government growin out of private conventions should be treated on a par with the debts due the ordinary citizen and that the losses which the government may sustain in excess of its *pro rata* share of the assets should not be borne *by the other creditors of the bankrupt,* but should be paid from the general revenues contributed by all the people.

---

*Compare *United States Bank* vs. *Planters Bank*, 9 Wheat., 904, 906, where the Court says:

> "It is, we think, a sound principle, that when a government becomes a partner in any trading company it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted."

POINT VII.

The order should be reversed and the Court below directed to enter an order decreeing that the claim of the United States is not entitled to priority over the claims of general creditors of the bankrupts.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 786.

JAMES C. DAVIS, DIRECTOR GENERAL AND AGENT (ATLANTIC COAST LINE), PETITIONER,

v.

E. H. PRINGLE, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF CHARLES F. BOYD COMPANY, INC., BANKRUPT, RESPONDENT.

No. 787.

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v.

E. H. PRINGLE, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF CHARLES F. BOYD COMPANY, INC., BANKRUPT, RESPONDENT.

CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

BRIEF FOR RESPONDENT.

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CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

BRIEF FOR RESPONDENT.

Statement of the Issue.

This matter comes up on a writ of certiorari directed to the United States Circuit Court of Appeals for the Fourth Circuit, which affirmed the judgment of the United States

District Court for the Eastern District of South Caroli
dismissing the petitions of James C. Davis, Director Gen
and Agent for the President for priority of payment
claims against Charles F. Boyd & Co., Bankrupt, for frei
charges, demurrage and storage charges growing out of
Federal operation of railroads.

The District Court dismissed the petition on the grou
that the priority statute (Section 3466 R. S) did not ap
to the claims of petitioner.

The Circuit Court of Appeals dismissed the claim
priority of payment on the ground that under the Ba
ruptcy Act of 1898 the United States was not entitled
priority except for taxes.

The sole question considered below and the only quest
before the Supreme Court in these proceedings is whet
the Petitioner James C. Davis, Director General of Railro
and Agent, is entitled to priority over other claims agai
the bankrupt in payment of the foregoing claims.

The claim to priority is based on the Act of 1797, R.
3466, which provides:

> "Whereas any person indebted to the Uni
> "States is insolvent, or whenever the estate of
> "deceased debtor, in the hands of the executors
> "administrators, is insufficient to pay all the de
> "due from the deceased, the debts due to the Uni
> "States shall be first satisfied; and the priority here
> "established shall extend as well to cases in whic
> "debtor, not having sufficient property to pay all
> "debts, makes a voluntary assignment thereof, or
> "which the estate and effects of an absconding, c
> "cealed or absent debtor are attached by process
> "law, as to cases in which an act of bankruptcy
> "committed."

Both the District Court and the Circuit Court of Appeals denied the claim of the petitioner to priority, but the decisions of the two Courts are based on different grounds.

The District Court held that Section 3466 R. S. does not apply to claims for demurrage, storage and freight charges which arose out of the operation of the railroads under Federal control. The District Court said:

> "In the opinion of the Court the provisions of "Section 3466 do not apply to the claims of the peti- "tioner. That statute contemplates debts to the "United States accruing to it directly under any "statutory or contractual directions. The present "claims do not fall into these categories. They are "claims arising only incidentally to the temporary "operation by the Government of the plant of a "transportation corporation, operated by the Gov- "ernment in like manner as it would have been "operated by the corporation itself had the Govern- "ment not taken possession. The very description "of the claims shows this. They are all for freight, "storage, and demurrage charges on merchandise "transported as shipped by private parties. The "Government in possession of the railway plant of "a corporation undertook the commercial transpor- "tation of articles shipped by private persons in like "manner as the same were transported by the cor- "poration when in possession of the railway plant "and lines."

This view was distinctly repudiated by the Circuit Court of Appeals under the decisions in the cases of Dupont *v.* Davis, 264 U. S. 456 (44 Sup. Ct. 68); North Carolina R. R. Co. *v.* Lee, 260 U. S. 16 (43 Sup. Ct. 2); M. P. R. R. Co. *v.* Ault, 256 U. S. 554 (41 Sup. Ct. 593); Northern Pacific

R. R. Co. *v.* North Dakota, 250 U. S. 135 (39 Sup. Ct. 50
In re Tidewater Coal Exchange, 280 Fed. 648; Ches. & D
Canal Co. *v.* United States, 250 U. S. 123 (39 Sup. Ct. 40
Davis *v.* Cirona Coal Co., 265 U. S. 219 (44 Sup. Ct. 53
but the Circuit Court of Appeals denied priority on
ground:

First. That in bankruptcy proceedings the Bankrupt
of 1898 supersedes Section 3466 R. S. in so far as the
statutes are inconsistent and,

Second. That the United States has no priority in ba
ruptcy except for taxes.

ARGUMENT.

*Section 3466 of the Revised Statutes does not apply
claims for freight charges, demurrage or storage arising
of Federal control of the railroad systems.*

In addition to the grounds on which is rested the decis
of the Circuit Court of Appeals in this case, we maint
that the District Court was also right in holding that Sect
3466 R. S. does not apply to these claims.

That the action of the Director General to recover u
a liability arising out of Federal control is an action on
half of the United States in its governmental capacity can
be questioned under the recent decisions of the Supre
Court cited in the opinion of the Circuit Court of Appeals

Dupont *v.* Davis, *supra.*

Ches. & Del. Canal Co. *v.* United States, *supra.*

Nor is there any doubt but that in taking over and operating the railroad systems of the country the United States did so in its sovereign capacity and as a war measure.

Ibid.

North Carolina R. R. Co. *v.* Lee, *supra.*

Missouri Pacific R. R. Co. *v.* Ault, *supra.*

The fact, however, that the United States is acting in its sovereign or governmental capacity does not give it the right to priority in the payment of debts due it.

This is purely a statutory right.

A natural confusion arises in considering the question presented here because of the anomalous position occupied by the United States.

The right to priority of payment of debts is a sovereign right under the common law. The general doctrine is that it is the prerogative of the State as the sovereign to claim priority over all its subjects in the payment of debts due it, and that this priority arises and exists independent of any statute.

Marshall *v.* People, 254 U. S. 73; 41 Sup. Ct. 143.

In re Tidewater Coal Exchange, 280 Fed. 648.

Equitable Trust Co. of N. Y. *v.* Connecticut Brass & Mfg. Corp., 290 Fed. 712.

It is equally well recognized as a general proposition of law that when a State or government enters into commercial business it divests itself, so far as concerns the transactions of such business, of its sovereign character, abandons its special prerogatives and is to be treated as a private citizen.

Bank of the United States *v.* Planters Bank, 9 Wheat., 904.

Salas *v.* United States, 234 Fed. 842.

Ches. & Del. Coal Co. *v.* United States, *supra.*

Both of these established principles apply here but in reverse form.

On the one hand, although in the operations of the railroads the United States took over a business enterprise, it did so as we have seen in its governmental capacity and as a war measure.

On the other hand, though a sovereign State, the United States has no sovereign right to claim priority of payment of debts due it by virtue of such sovereignty. Petitioner must rely as he does rely solely on the provisions of the Statute. No question can arise as to the waiver of a sovereign right to priority of payment as no such sovereign right exists in the United States.

In United States *v.* State Bank of North Carolina, 6 Peters, 29, the Supreme Court said:

> "The right of priority of payment of debts due to
> " the Government, is a prerogative of the crown well
> " known to the common law. It is founded not so
> " much upon any personal advantage to the sovereign,
> " as upon motives of public policy, in order to secure
> " an adequate revenue to sustain the public burdens
> " and discharge the public debts. The claim of the
> " United States, however, does not stand upon any
> " sovereign prerogative, but is exclusively founded
> " upon the actual provisions of their own statutes."
>
> See also Equitable Trust Co. of N. Y. *v.* Connecticut Brass & Mfg. Corp. *supra.*
>
> United States *v.* State of Oklahoma, 261 U. S. 253 (43 Sup. Ct. 295).

We not infrequently find in the decisions reference to the sovereign preferential right of the United States but this is

erroneous. The right is exclusively statutory and while declared to be a policy for the good of the public it is not one of the attributes of the sovereignty of the United States. Consequently, in determining the claim of the right to priority of payment there is not involved any question of sovereign rights or immunities. We must therefore look further than the decisions which hold that the United States acted in its sovereign capacity in taking over and operating the railroad systems and that in collecting debts arising out of such Federal control the Director General is acting on behalf of the United States in its governmental capacity.

In collecting debts, the Government may be acting in its sovereign capacity, but in claiming priority, it depends exclusively on statutory authority.

Where the provisions of a subsequent law are repugnant to and inconsistent with a previously existing law the former law must yield to the latter and is to the extent of the repugnancy superseded by it.

In the case of Cook County National Bank *v.* United States, 107 U. S. 445, suit was brought in behalf of the United States, under Section 3466 of the Revised Statutes, against the Receiver of an insolvent national bank to obtain priority in payment of postal funds deposited in the bank. The Court denied any right to priority in view of the provisions of the National Bank Act, saying:

> "We consider that act as constituting by itself a
> "complete system for the establishment and govern-
> "ment of national banks, prescribing the manner in
> "which they may be formed, the amount of circulat-
> "ing notes they may issue, the security to be furnished
> "for the redemption of those in circulation; their

" obligations as depositaries of public moneys, and
" such to furnish security for the deposits, and des
" nating the consequences of their failure to rede
" their notes, their liability to be placed in the han
" of a receiver, and the manner, in such event,
" which their affairs shall be wound up, their cir
" lating notes redeemed, and other debts paid or th
" property applied towards such payment. Eve
" thing essential to the formation of the banks,
" issue, security, and redemption of their notes,
" winding up of the institutions, and the distributi
" of their effects, are fully provided for, as in a se
" rate code by itself, neither limited nor enlarged
" other statutory provisions with respect to the set
" ment of demands against insolvents or their estate

In the case of Guarantee Title & Trust Co. *v.* Title Gu
anty & Surety Co., 224 U. S. 132 (32 Sup. Ct. 457), a sur
who had paid the United States money due on a bankru
bond claimed priority of payment, under Section 3466, o
claims for labor, on the ground that it was subrogated to
right of the United States. For the purposes of the decis
the Court assumed that the surety might assert whate
priority the United States possessed. The Court denied a
right to priority in view of the provisions of the Bankrup
Act of 1898, saying:

"The act takes into consideration, we think,
" whole range of indebtedness of the bankrupt—
" tional, state, and individual—and assigns the or
" of payment. The policy which dictated it was
" neficent and well might induce a postponement
" the claims, even of the sovereign, in favor of th
" who necessarily depended upon their daily lab
" And to give such claims priority could in no e

> " seriously affect the sovereign. To deny them prior-
> " ity would in all cases seriously affect the claimants."
>
> See also Robertson *v.* Howard, 229 U. S. 263.
> Krichman *v.* U. S., 256 U. S. 364, and
> Commonwealth *v.* Allen, Commissioner of Banks, 240 Mass. 244; 133 N. E. 625, hereinafter more fully discussed in reference to the Bankruptcy Act of 1898.

The Transportation Act of 1920 *takes into consideration the whole range of activities for terminating Federal control and constitutes by itself a complete method to winding up the Government's business.*

When the necessity for the control and operation of the railroads of the country ceased, Congress passed what is known as the Transportation Act of 1920, under which Federal control of the railroad systems ceased at 12.01 a. m. on March 1, 1920. This Act is entitled:

> " An Act to provide for the termination of Federal
> " control of railroads and systems of transportation;
> " to provide for the settlement of disputes between
> " carriers and their employees; to further amend an
> " Act entitled 'An Act to regulate commerce' ap-
> " proved February 4, 1887, as amended, and for
> " other purposes."

The Act consists of five titles, Title II being devoted exclusively to the subject of the termination of Federal control. This title sets up a most elaborate and complete procedure for winding up all matters connected with Federal control and provides for everything that is essential to accomplish this. As is said by Mr. Justice Sutherland in the recent case of E. I. Dupont de Nemours & Co. *v.* James C. Davis,

Director General of Railroads, as agent, 264 U. S. 456, it "is complete in itself."

Under Section 202 of this title the President is directed to adjust, settle, liquidate, and wind up all matters including compensation and all questions and disputes of whatsoever nature arising out of or incident to Federal control. Under Section 200, the powers conferred upon the President by the Federal Control Act are continued so far as they are necessary or proper incident to the winding up or settling of matters arising out of Federal control. It is solely by virtue of this Act and of the powers vested in the President and in the agent appointed by him that the petitioner here exists or functions. Most elaborate provisions are made for determining the debts due to the United States by the railroads and for the terms of their payment. Instead of priority of payment, specific terms are set forth in Section 207 for refunding of carrier's indebtedness to the United States and for giving security for the payment of such indebtedness.

The Transportation Act having provided for adjustments between the carriers and the United States and likewise in Section 202 of all questions and disputes of whatsoever nature arising out of Federal control, and containing no provision whatever for priority of payment, it necessarily follows that no such right to priority of payment exists with reference to debts accruing to the United States as a result of Federal control and operation of railroads.

In short, the following language from the opinion of the Supreme Court in Cook County National Bank *v.* United States, *supra*, applies most aptly:

> " A law embracing an entire subject, dealing with
> " it in all its phases, may thus withdraw the subject

> " from the operation of a general law as effectually
> " as though, as to such subject, the general law were
> " in terms repealed. The question is one respecting
> " the intention of the legislature. And although as
> " a general rule the United States are not bound by
> " the provisions of a law in which they are not ex-
> " pressly mentioned, yet if a particular statute is
> " clearly designated to prescribe the only rules which
> " should govern the subject to which it relates, it will
> " repeal any former one as to that subject. Daviess
> " *v.* Fairbairn, 3 How. 636; United States *v.* Tynen,
> " 11 Wall. 88."

An examination of the Federal Control Act and of the decisions rendered with reference to it makes it still more evident that it was never intended that the provisions of Section 3466 should apply to the collection of freight demurrage and storage charges arising out of the operation of the railroad systems by the United States.

In the case of Northern Pacific Ry. Co. *et al. v.* State of North Dakota, 250 U. S. 135 (39 Sup. Ct. 502), in which the Supreme Court held that the taking over of the railroads by the President vested him with power to fix intrastate rates though such rates were in conflict with rates previously fixed by State authority, the completeness with which the entire subject matter of the rights of the United States in connection with Federal control was covered by the Federal Control Act and the proclamation of the President is forcefully expressed:

> " No elaboration could make clearer than do the
> " act of Congress of 1916, the proclamation of the
> " President exerting the powers given, and the act of
> " 1918 dealing with the situation created by the ex-

> "ercise of such authority, that no divided but a com-
> "plete possession and control were given the United
> "States for all purposes as to the railroads in ques-
> "tion. But if it be conceded that despite the abso-
> "lute clarity of the provisions concerning the control
> "given the United States, and the all-embracing scope
> "of that control, there is room for some doubt, the
> "consideration of the general context completely
> "dispels hesitancy. How can any other conclusion
> "be reached if consideration be given the compre-
> "hensive provisions concerning the administration
> "by the United States of the property which it was
> "authorized to take, the financial obligations under
> "which it came and all the other duties and exactions
> "which the act imposed, contemplating one control,
> "one administration, one power for the accomplish-
> "ment of the one purpose, the complete possession by
> "governmental authority to replace for the period
> "provided the private ownership theretofore exist-
> "ing."

In the case of Missouri Pacific R. Co. *v.* Ault, 256 U. S. 554 (41 Sup. Ct. 593), suit had been brought against the railroad company and the Director General. The Supreme Court held that the railroad company could not be held liable for the acts of the Director General, and in considering Section 10 of the Federal Control Act, which provides that "the carriers while under Federal control shall be liable to all laws, etc.," said:

> "The plain purpose of the above provision was to
> "preserve to the general public the rights and reme-
> "dies against common carriers which it enjoyed at
> "the time the railroads were taken over by the Presi-
> "dent except in so far as such rights or remedies

"might interfere with the needs of Federal opera-
"tion. The provision applies equally to cases where
"suits against the carrier companies were pending
"in the courts on December 28, 1917, to cases where
"the cause of action arose before that date and the
"suit against the company was filed after it, and to
"cases where both cause of action and suit had arisen
"or might arise during Federal operation. The Gov-
"ernment was to operate the carriers, but the usual
"immunity of the sovereign from legal liability was
"not to prevent the enforcement of liabilities ordi-
"narily incident to the operation of carriers. The
"situation was analogous to that which would exist
"if there were a general receivership of each trans-
"portation system. Operation was to be continued
"as theretofore with the old personnel, subject to
"change by executive order. The courts were to go
"on entertaining suits and entering judgments under
"existing law, but the property in the hands of the
"President for war purposes was not to be disturbed.
"With that exception the substantial legal rights of
"persons having dealings with the carriers were not
"to be affected by the change of control."

Furthermore, to recognize that the Transportation Act and the Federal Control Act cover the whole subject of the control and operation of the railroad systems by the Government, including all questions as to the right to priority of payment results in reconciling what is otherwise an irreconcilable and utterly illogical and unreasonable discrimination against those who were concerned with water transportation instead of land transportation during the war.

In its sovereign capacity and as a war measure the United States undertook to control and operate all means of transportation of goods both by land and by sea.

In order to handle ocean transportation of goods it adopted a commercial garb and organized the Emergency Fleet Corporation and abandoned its special prerogatives.

In order to handle land transportation it exercised its sovereign power of eminent domain and retained all of its governmental rights.

In both instances the purpose was the same—to prevent interference with the uninterrupted transportation of goods for war purposes.

In neither instance was it contemplated or intended to extend the power and prerogatives of the United States one hair's breadth beyond what was essential to accomplish its purpose.

In the one instance it abandoned all right to claim priority of payment by subjecting itself to the laws governing private corporations.

Sloan Shipyards *v.* United States Fleet Corporation, 258 U. S. 549 (42 Sup. Ct. 385).

United States *v.* Wood, 263 U. S. 680 (44 Sup. Ct. 134).

In the other it framed a complete system of law covering the entire subject of the relative rights, liabilities and obligations of the United States, the railroads and those who dealt with the railroads during Federal control.

The Bankruptcy Act of 1898.

The United States has no priority in bankruptcy except for taxes.

We now come to the ground on which the Circuit Court of Appeals denied the right to priority of payment.

In discussing this point we shall assume that but for the Bankruptcy Act of 1898, the United States would be entitled to priority in payment under Section 3466, although as we have shown the Federal Control and Transportation Acts complete in themselves supersede Revised Statutes, Section 3466.

Prior to the Bankruptcy Act of 1898, the right of priority existed both by virtue of Section 3466 and under the Bankruptcy Act of 1867.

Lewis *v.* United States, 92 U. S. 618.

The act of 1898, however, assigns the order of payment of all debts of the bankrupt—national, state and individual—and, so far as its provisions are inconsistent with Section 3466, supersedes the former law.

Guarantee Title & Trust Co. *v.* Title Guaranty Co., *supra.*

Cook County National Bank *v.* United States, *supra.*

United States *v.* Wood *et al.*, 290 Fed. 109 (affirmed 263 U. S. 680; 44 Sup. Ct. 134).

The decisions and course of reasoning hereinbefore cited in this brief with reference to the Transportation Act being complete in itself and superseding all earlier acts on the subject, apply even more forcibly to the Bankruptcy Act of 1898 which is complete in itself and does not bring forward Section 3466 of Revised Statutes.

The same general principles were applied by the Supreme Court in the case of *Robertson v. Howard,* 229 U. S. 263, in which the court held that the general laws relating to sales of real estate under judgments and decrees of courts of the

United States did not govern sales of real estate by courts
bankruptcy, as the Bankruptcy Act was a later law, covere
an entire subject, and was special in its nature and it pr
posed comprehensively to deal with the subjects comin
within the scope of bankruptcy legislation.

In Krichman *v.* United States, 256 U. S. 364, the sam
general rules were applied. Krichman was indicted for o
fering a bribe to a baggage porter, employed during Feder
control, under the Act of Congress of March 4, 1909, makin
it an offence to offer a bribe to a person acting for the Unite
States in an official function by or under the authority of
department or office of the Government. The Court held i
effect that the Federal Control Act did not bring forward th
former act relating to such offenses, calling attention to th
fact that "the statute creating the offense was passed lon
" before there was any thought of the Government takin
over the railroads."

Similarly, in Bardes *v.* First National Bank of Howarde
178 U. S. 524, 537; 44 L. Ed. 1175, this Court in construin
certain provisions of the Bankruptcy Act of 1898, referred t
the Act of 1867, and in comparing its provisions with th
later act, said:

> "We find it impossible to infer that when Congres
> " in framing the Act of 1898, entirely omitted an
> " similar provision and substituted the restrictive pr
> " visions of Sec. 23, it intended that either of thos
> " courts should retain the jurisdiction which it ha
> " under the obsolete provision of the earlier acts."

May we not apply the same process of reasoning (as th
lower court did) in comparing the Act of 1898, Section 6

sub-section 5, with the Act of 1867, Section 28, and note that in the Act of 1898, only taxes are given priority, whereas in the Act of 1867 *debts* and taxes due the United States are given priority.

Petitioner concedes that Section 3466 R. S. has been partially superseded by the Bankruptcy Act of 1898 and hangs his whole contention on the proper construction of Section 64 (*b*) 5 of the Bankruptcy Act.

This section provides as follows:

> "(*b*) Debts to have priority, except as herein pro-
> " vided, and to be paid in full, * * * and the order
> " of payment shall be: * * * (5) debts owing to
> " any person who by laws of the States or the United
> " States is entitled to priority."

It is the contention of the petitioner that as Section 3466 R. S. is a law of the United States by which "debts due the United States" are given priority, the United States comes within the provision of the section of the Bankruptcy Act above quoted giving priority of payment to "any person" entitled to priority by law.

It is necessary to construe the word "person" to include the United States in order to sustain petitioner's contention.

Here again we may point out an anomalous situation. The general doctrine is that the United States will not be bound by the provisions of any law in which they are not expressly mentioned. Here the contention is that the United States must be included, although specifically left out.

The Construction Placed by Congress Itself.

In determining the legislative intention in using the word "person" in this section, no better method can be adopted

than to consider the history of the steps taken in the enactment of the law as disclosed by the legislative record. This is what the Circuit Court of Appeals has done in this case with conclusive effect.

In the case of Pennsylvania R. R. Co. *v.* International Coal Mine, 230 U. S. 184 (33 Supreme Court, 893) International Coal Mining Co. sued the Pennsylvania R. R. Co to recover damages because of rebates allowed to other shippers, under the provisions of an act of Congress providing that any carrier doing any act prohibited by the statute should be liable to the person * * * injured thereby for the full amount of damages sustained in consequence of any such violation." Plaintiff while establishing that rebates had been allowed other shippers, neither alleged nor proved any damage to itself. It contended that this was not necessary for the reason that it was entitled to recover damages as a matter of law. The Supreme Court pointed out that while such a right of action had been expressly given in the original bill as it passed the Senate, this provision was omitted in the act as finally passed. The Supreme Court held that the fact that this provision measuring the amount of recovery by rebate was omitted from the act as finally reported to both houses and passed, was not only significant but conclusive.

See also:

United States *v.* Alexander, 12 Wall., 177.

Lewis Publishing Co. *v.* Morgan, 229 U. S. 288 (33 Sup. Ct. 867).

Chesapeake etc. Telephone Co. *v.* Manning, 186 U. S. 238 (22 Sup. Ct. 881).

Blake *v.* National City Bank, 23 Wall., 307, 319.
Platt *v.* Union Pacific R. Co., 99 U. S. 48, 64.
Church of Holy Trinity *v.* United States, 143 U. S. 457, 464 (12 Sup. Ct. 511).

A Decision of this Court in Point.

In United States *v.* Fox, 94 U. S. 315, 321, the validity of a devise to the United States of real estate in New York was held by this Court to be void because the United States was not a "person" within the meaning of the Statute of Wills. Mr. Justice Field, delivering the opinion of the Court, says:

> "There was no general power at common law to "devise lands. * * * Every person must, there- "fore, devise his lands in that State within the limi- "tations of the Statute or he cannot devise them at all. "His power is bounded by its conditions. That "Statute provides that a devise of lands may be made "'to any *person* capable by law of holding real es- "tate' * * *.
>
> "The term 'person' as here used applied to natural "persons, and also to artificial persons,—bodies poli- "tic, deriving their existence and powers from legis- "lation,—but cannot be so extended as to include "within its meaning the Federal Government. It "would require an express definition to that effect to "give it a sense thus extended. * * * a devise "to the United States of real property situated in "that State is, therefore, void."

The refusal of the Circuit Court of Appeals in the case at bar to manipulate the word "person" out of its ordinary and accepted meaning, is fully supported not only by the con-

struction which Congress is shown to have intended when the Bankruptcy Act was in the course of being passed, but also by the unanimous opinion of this Honorable Court in the case of United States *v.* Fox, ***supra.***

The Conflicting Decisions.

The Court below states that its conclusions are in conflict with the decisions in the following cases:

In re Tide Water Coal Exchange, 280 Fed. 648-650.
In re Western Implement Company, 171 Fed. 81 (41 Sup. Ct. 29).

To these petitioner adds the following:

United States *v.* National Surety Co., 254 U. S. 73.
United States *v.* Oklahoma, 261 U. S. 253.
In re Hibner Oil Co., 264 Fed. 667.
Davis *v.* Pullen, 277 Fed. 650.
In re Atlantic G. & P. Steamship, 289 Fed. 186.
Lott *v.* Salisbury, 237 Fed. 191.
Davis *v.* Miller Link Co., 296 Fed. 649.

Let us consider first the cases referred to by petitioner.

In the case of United States *v.* National Surety Co., 254 U. S. 73, the Surety Company had executed to the United States surety bonds to secure the performance of a contract. The contractor defaulted and was later adjudicated bankrupt and the loss to the Government was considerably more than the amount of the bonds. The Surety Company paid the amount due on the bonds and then both the United States

and the Surety Company proved their claims in bankruptcy and each claimed the right to priority of payment as against the other; the United States claiming under Section 3466 R. S. for the balance of its loss and the Surety Company claiming under Section 3468 R. S. for the amount it had paid the United States. The only point involved in the case is stated by the Court to be the single question whether in the distribution of the bankrupt's estate the United States has priority over the Surety Company. This question was answered in favor of the United States.

It is only by inference that this decision can be said to affect the question here; neither in the Court below nor in the Supreme Court, was the effect of the Bankruptcy Act of 1898 on these sections brought into question. As against the Surety Company, and considering solely the two sections the United States was held to be entitled to priority. That is all that the case decided and it throws no light on the point to be decided in this case. That it does not decide the question for consideration here is clearly pointed out in the decision of the Court below in the case at bar.

In the case of United States *v.* State of Oklahoma, 201 U. S. 253 (43 Sup. Ct. 295) the United States brought suit in the United States Supreme Court to establish priority of its claim against the State Bank of Guthrie for funds deposited in the bank. The bank had closed its doors, was alleged to be insolvent and was in the hands of a receiver. The sole question was whether the case came within the provisions of Section 3466 R. S. and the Supreme Court held that it did not. No question of the Bankruptcy Act of 1898 was involved in the case.

In the case of *in re* Hibner, the only question conside by the Court was whether a claim by the Director Gen for freight charges accrued during Federal control con tuted a debt due to the United States. The Court says:

> "If the claim is property of and constitutes a d due to the United States then *concededly* its prio was properly found."

On the point decided, viz: that the freight charges c stituted a debt due the United States, the Court based decision entirely on the language of Section 12, Chap. 2 the Act of Congress of March 21, 1918, known as the "F eral Control Act," and after holding that the words of Statute unqualifiedly declare the ownership of the mon and other property derived from operation of the carrier be in the United States, the Court concludes:

> "The claim for freight charges if 'property' rived from operation of the carrier during Fede control and is thus property of *and therefore* a d due to the United States. As such it is entitled the priority found."

While the freight claim was properly held to be property of the United States, it by no means follows a conclusion that it is *"as such,"* a debt due to the Uni States which is entitled to priority. This decision cann we submit, be accepted as a controlling or even a persuas authority on the question under consideration.

In the case of Davis *v.* Pullen, 277 Fed. 650, a credit bill had been filed against D'Arcy & Sons Co. and a recei had been appointed to take possession of its assets. Liqui

tion followed and the Director General filed a claim for freight charges arising out of Federal control and claimed priority of payment under Section 3466 R. S. The Court held that the proceeding came within the provision of the Act and allowed the claim for priority. No question of the Bankruptcy Act of 1898 was involved and the case is clearly not in conflict with the present decision. It may be noted that the Court, in commenting on the allowance of priority of payment, said:

> "There is a certain obvious injustice in giving the United States when engaged in an industrial and commercial venture, even although under war powers, superior rights over other creditors bearing like relations to insolvent."

The case of *in re* Atlantic Gulf & Pacific Co., 289 Fed. 145, was decided by a District Court of the Fourth Circuit and cannot be considered as authority here. That was a case where the United States claimed both a lien on the assets of a bankrupt concern and the right to priority of payment and the Court held there was no debt due the United States and dismissed its claims.

The case of Lott *v.* Salisbury, 237 Fed. 191, arose in the Fourth Circuit and was decided by the same Court which rendered the present decision. It cannot therefore be said to be a conflicting authority. It is difficult to see where the case is in point. The question there was as to the priority in bankruptcy of the rent claim of a landlord under a lien over the claim of a clerk for wages. The lien of the landlord was given priority.

The case of Davis *v.* Miller Link Co., 296 Fed. 649, is

equally not in point. This was a Receivership case in which the Director General filed a petition of intervention and claimed the right to priority of payment of a debt arising out of a contract made by him during Federal control with reference to the operation of a railroad.

The Court held that the case was similar to the case of Davis *v.* Pullen, *supra,* and that priority of payment should be allowed. The Bankruptcy Act of 1898 did not enter into the consideration of the case at all.

We shall now take up the cases referred to by the Circuit Court of Appeals.

In the case of Western Implement Co., 171 Fed. 81, the Circuit Court of Appeals merely approved and affirmed the decision of the Court below and we must look to the decision of the District Court, which is found in 166 Fed. 576, for the opinion.

The question here was as to the right of the State of Minnesota to priority of payment of a claim for binding twine manufactured by the State in its penitentiary. The Court held that the claim could only be sustained under the provisions of Sub-division b, Clause 5, Section 64 of the Bankruptcy Act of 1898, and that in order to determine this question the precise scope and meaning of the phrase "debts owing to any person" as appearing in clause 5, should be ascertained.

The Court reached the conclusion that as "persons" is defined in the Bankruptcy Act to include corporations, and as the word "corporations" is defined in the Act to mean "all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships," and as a State is a body, having some of the powers and

privileges, that a State is a person, within the meaning of the Bankruptcy Act.

In further support of this finding the Court says with reference to the Act of 1797, Section 3466 of the Revised Statute:

> "This statute was enacted on March 3, 1797, c. 20, 1 Stat. 515, and has remained in force until the present day. It expresses the general policy of this Government with respect to the preference of debts due to the United States over debts due to its citizens. The various States of the Union have by legislative enactment declared the same public policy with respect to preferences of debts due the State, and this public policy of the various States has been recognized by Congress in at least one bankruptcy law, that of 1867. It is difficult to conceive that the Congress, when they enacted the national bankruptcy act of 1898, intended to render nugatory this policy of the Federal and State Government which had been so distinctly recognized for so many years, and that, too, by a mere failure to insert some express provision covering the subject. In my judgment, clause 5 of sub-division 'b' of section 64 was intended by Congress to fully preserve not only the rights of the several States, but the rights of the United States, with respect to priorities of debts from bankrupt estates.
>
> "It is to be observed also that, unless clause 5 of sub-division 'b' is accorded this construction, it cannot be given such a construction respecting a debt due to the United States, should such a case arise. This same clause which has been invoked by the Attorney General of the State of Minnesota to protect the priority of the State in this claim must be invoked by the United States whenever the National Government

seeks to prove any debt which it may have against a bankrupt estate. The bankruptcy act of 1800 (Act April 4, 1800, c. 19, par. 62, 2 Stat. 36), as well as the bankruptcy acts of 1841 (Act Aug. 19, 1841, c. 9, par. 5, 5 Stat. 444), and of 1867 (Act March 2, 1867, c. 176, 14 Stat. 531), par. 28, expressly recognize the priority of the debts due the United States, thus preserving in all of its essential features the provisions of section 3466 of the Revised Statutes relating to priorities, hereinbefore quoted. The bankruptcy act of 1898 contains no express provision preserving in so many words the priority of debts due the United States, and, if priority is to be accorded to such debts, the authority therefor must be found in clause 5, subd. 'b,' par. 64, of the bankruptcy act of 1898. I feel satisfied that the United States must be regarded as a 'person' within the meaning of that clause (*In re* Stoever [D. C.], 127 Fed. 394); and, by a parity of reasoning, I am forced to the conclusion that a State should likewise be regarded as a 'person' within the meaning of this law."

In view of the history of the steps taken in the passage of the Bankruptcy Act as set forth in the opinion of the Circuit Court of Appeals in the case at bar, it is evident there is no foundation for the surmise indulged in by the learned District Judge, which is also at variance with the decision of this Court in United States *v.* Fox, *supra*.

In the case of Tide Water Coal Exchange, decided by the Circuit Court of Appeals for the Second Circuit, 280 Fed. 648, in which a Writ of Certiorari was denied by the Supreme Court (260 U. S. 721; 43 Sup. Ct. 12), the question of the right to priority of payment under the Bankruptcy Act of 1898 was only incidentally before the Court. At a meeting

of creditors of the bankrupt, the Director General of Railroads who had proved a claim in bankruptcy attempted to vote for the trustee, but was refused the right to vote by the Referee, who based his refusal on the ground that the United States, through the Director General, was a creditor holding a claim which had priority and as such is not entitled to vote under the provisions of Section 56 "b" of the Bankruptcy Act. The order of the Referee was sustained by the District Court and by the Circuit Court of Appeals.

It does not appear that any dispute was made as to the correctness of the holding by the Referee that the Director General was a creditor who had priority. The position taken apparently by the Director General was that this was immaterial to his contention and that the right to vote at the meeting was a sovereign right which could not be taken away or limited by any Statute unless the United States was specifically mentioned therein and that, as Section 56 "b" of the Bankruptcy Act of 1898 which exempts from the right to vote, creditors having priority, does not in terms mention the United States, therefore it was not deprived of the right to vote. In other words, the question as to the right to priority of payment did not arise in this case at all.

The language used by the Court is as follows:

> "The Bankruptcy Acts of 1800, of 1841, and of 1867 expressly recognize the priority of debts due the United States, thus preserving in all its essential features the provisions in the Act of 1797, reproduced in Section 3466 of the Revised Statutes relating to priorities. The Bankruptcy Act of 1898 contains no similar express provision, and if, under that Act priority is given, it must be because of clause 5, subd. (b), Sec. 64, which reads as follows: (5)

debts owing to any person who by the laws of the States or of the United States is entitled to priority.

"We have no doubt that the United States is to be regarded as a person within the meaning of the clause cited and can assert its priority as given it under Section 3466 of the Revised Statutes, which is reproduced in the margin. The priority secured to the United States is priority over all creditors. The statutory provision referred to is simply declaratory of the common law rule which entitles a sovereign to priority over other creditors of an insolvent. United States *v.* National Surety Company, 254 U. S. 73, 75; 41 Sup. Ct. 29; 65 L. Ed. 143."

The language of the Court is conclusive in form and is in direct conflict with the decision of the Circuit Court of the Court of Appeals for the Fourth Circuit. Besides the fact, however, that the question covered by this language did not arise in the case, it is clear that no special attention was paid by the Court to the legislative history of the section of the Bankruptcy Act under consideration nor to the decision of the Supreme Court of the United States in United States *v.* Fox, *supra*. The Court points out that there was a marked departure in the Bankruptcy Act of 1898 from the previous bankruptcy acts, with reference to priority of debts due the United States, and shows that it is only by giving to the word "person" a construction quite foreign to its real meaning that the priority of the United States under this Act can be maintained. When we see what the real history of the Act was, as is so fully set out in the opinion of the Circuit Court of Appeals in the case at bar, it is clear that it was never the intention of Congress that the word "person" should include the United States.

Moreover, it is very interesting to note just what the Circuit Court of Appeals for the Second Circuit did decide in this case. We find in the decision a very learned and interesting dissertation on sovereign rights and the prerogative of Kings, and attention is invited to certain citations from decisions rendered by the Supreme Court of the United States in the early seventies, at a time when sovereign powers and governmental prerogatives were much in vogue, indicating that certain royal prerogatives belonged to the United States as a State, just as much as they did to the British Crown. In the end, however, the Court takes away everything that it grants and holds specifically that the United States had no right to vote for the trustee. The Court says at page 652, "In providing that secured or priority creditors shall not be entitled to vote at creditors' meetings, no creditor is deprived of any right with which he had been previously invested. To hold, as the Court below did, that the United States, because it was a priority creditor, could not vote, did not deprive the United States of any existing prerogative or interest which it ever possessed. The rule that the United States as a sovereign is not bound by the general language of a statute unless named therein, ordinarily applies where a statute tends to restrain or diminish existing powers, rights or interests of the sovereign."

The Transportation Act of 1920 neither restrained nor diminished any existing powers, rights or interests of the sovereign. This Act and the Federal Control Act, vested in the Director General the powers which he has, and the right to collect debts arising out of the operation of the railroad system is an incident to the operation. Clearly the decision in this case does not establish the rights claimed by the Director General.

It is very interesting to read and analyze, in connection with the decision of the Circuit Court of Appeals for the Second Circuit, in the case of Tide Water Coal Exchange *supra*, the decision of the same Court, with an opinion written by the same Judge (Rogers, Circuit Judge) in the case of Equitable Trust Company of New York *v.* Connecticut Manufacturing Corporation, et al., 290 Fed. 712. It is made very clear in the latter decision that any comments made in the previous case on the sovereign powers of the United States was not intended to indicate an opinion by the Court that the United States was entitled under any theory of sovereignty to priority in the payment of its debts. In this case Plaintiff had brought suit as a creditor of the defendant Manufacturing Corporation in the United States District Court of Delaware, alleging gross mismanagement, and obtained the appointment of a receiver of the property of the defendant. Thereafter plaintiff also brought suit in the United States District Court for the District of Connecticut, and obtained the appointment of an ancillary receiver of the property of the defendant there. The United States intervened in the latter suit, claiming that the defendant was indebted to it in a large sum and asking for an Order for the payment of its debt before any other debts should be paid, under the provisions of Sections 3466 and 3467 of the Revised Statutes. The intervening petitioner alleged that the assets of the defendant were not sufficient to pay in full its liabilities but did not allege that the defendant debtor was insolvent.

The Court makes a most elaborate review of the decisions involving the priority statute from the case of United States *v.* Fischer, 2 Cranch. 258 to the recent decision of the Supreme Court in the case of United States *v.* State of Oklahoma, 261 U. S. 253 (43 Sup. Ct. 295), and states its conclusion as to the law as follows (page 723):

> "We think the decisions of the Supreme Court extending over a period of more than 100 years have clearly established the law that the right of the United States to priority of payment is statutory, and does not apply while the debtor continues the owner of the property, even though he is unable to pay his debts."

The Court says further (page 716):

> "We think it clear that whatever claim to priority the United States may assert does not rest upon the theory of sovereignty; it is no doubt true of common law that a sovereign is entitled to priority over the claims of individual creditors. That such a priority can be asserted by the sovereign is recognized in England in the earliest reported cases." * * *
>
> "There seems a marked difference of opinion in the several states as to whether or not the prerogative of the crown has been adopted by the states as part of their common law. It has been held in some states that it has been adopted. (Citing decisions), while in certain other states if the right exists at all, it is dependent entirely upon statute (citing decisions).
>
> "Whatever the rule may be in the several states, the question whether the United States has a common law of its own is quite a different matter. The Supreme Court has said on numerous occasions that there is no common law of the United States (page 718). * * *
>
> "As the United States has no common law, whatever right of priority in the payment of debts the United States possesses over other creditors exists because of some statute which confers it. It does not exist independently of statute."

We respectfully submit that the decision be affirmed for the following reasons:

1. The Federal Control Act and the Transportation Act of 1920 are complete in themselves, provide for no priority in payment of debts due the Government arising out of Federal control, and Section 3466 Revised Statutes is superseded by said acts and is not applicable to this case.

2. Under the Bankruptcy Act of 1898 and the history of legislative action leading to its passage and contemporaneous legislative construction of that act, the provision for priority to the United States contained in the earlier bankruptcy acts having been purposely left out, it was the clear intention of Congress that debts due the United States, other than for taxes, should not have priority of payment and Revised Statutes, Section 3466 is superseded by the Bankruptcy Act of 1898 as far as bankruptcy cases are concerned.

3. That the word "person" should not be construed out of its ordinary and natural meaning in order to defeat the plainly expressed intention of Congress in passing the Bankruptcy Act of 1898.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM 1924

MIDDLETON S. BORLAND, TRUSTEE IN Bankruptcy of Knauth, Nachod & Kuhne, Petitioner
v.
UNITED STATES OF AMERICA
No. 1085

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

STATEMENT

This case comes here on writ of *certiorari* to review the judgment of the Circuit Court of Appeals for the Second Circuit, allowing priority for claims of the United States filed against bankrupt estates.

The claim of the United States arises out of foreign drafts purchased from Knauth, Nachod & Kuhne by the Post Office Department to pay balances due foreign governments on money-order accounts. The total amount of the government's claim is $147,462.32, which represents the total of

44500—25——1

the amounts paid by the Postmaster General for the drafts, together with two items of $18.80 and and $1.40, respectively, paid by the government for protest fees, cable charges, etc., in the case of two drafts which went to protest. Knauth, Nachod & Kuhne were adjudicated bankrupts before the drafts were presented for payment.

It is not questioned that the claim is a debt due the United States, nor that the debtors, Knauth, Nachod & Kuhne, are insolvent. The claim, therefore, clearly falls within the purview of section 3466 of the Revised Statutes. Whether the claim is entitled to priority of payment under section 64(b)5 of the Bankruptcy Act of 1898 is the only question submitted for the decision of this court.

ARGUMENT

I.

The claim of the Government is a preferred claim under section 3466, Revised Statutes, and section 64(b)5 of the Bankruptcy Act

The right of the United States to priority in payment of its claims against insolvent debtors is statutory. Section 3466, Revised Statutes, taken from the Bankruptcy Act of 1797, provides:

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is unsufficient to pay all the debts due from the deceased, the debts due to the United States

> shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

Section 64(b) of the Bankruptcy Act of 1898 (30 Stat. 544, 563) provides:

> The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be * * * (5) debts owing to any person who by the laws of the States or the United States is entitled to priority.

The Bankruptcy Acts of April 4, 1800, c. 19, 2 Stat. 19, 36; August 19, 1841, c. 9, 5 Stat. 440, 444; and March 2, 1867, c. 176, 14 Stat. 517, 531, expressly recognized the priority of debts due the United States, thus preserving the provision in the Act of 1797 (section 3466, Revised Statutes) relating to priority. The Bankruptcy Act of 1898, act of July 1, 1898, c. 541, 30 Stat. 544, contains no similar provision in which the United States is expressly named. Under the decision of this court, however, in *Lewis, Trustee,* v. *United States,* 92 U. S. 618, 622, that the provision in the Bankruptcy Act of 1867 expressly according priority to claims of the United States was "*in pari materia* with the several acts giving priority of payment to the

United States, and was doubtless put in to recognize and reaffirm the rights which those statutes give and to exclude the possibility of a different conclusion," it makes no difference that the express provision is omitted from section 64(b) of the Bankruptcy Act of 1898, as the express provision in the Bankruptcy Act of 1867 was a mere reaffirmation of a statutory right then existing.

In section 64(b)5 priority in payment of claims is given to any "person" who is entitled to priority under the laws of the States or the United States.

Section 1(a) of the Bankruptcy Act of 1898 (30 Stat. 544) provides:

> The words and phrases used in this act and in the proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: * * *
>
> (6) "Corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships. * * *
>
> (19) "Persons" shall include corporations, except where otherwise specified: * * *.

The definitions of the words "corporations" and "persons" contained in clauses 6 and 19, being in no way "inconsistent with the context" of section 64(b)5, these words should be construed as defined. Is the United States a "person" within the meaning of section 64(b)5 as defined by section 1(a) of the Bankruptcy Act?

That the United States is a corporation has been held by this court.

United States v. *Perkins*, 163 U. S. 625, 630–631. There the court said:

> In addition to this, however, the United States are not one of the class of corporations intended by law to be exempt from taxation. What the corporations are to which the exemption was intended to apply are indicated by the tax laws of New York and are confined to those of a religious, educational, charitable, or reformatory purpose. We think it was not intended to apply it to a purely political or governmental corporation like the United States.

In considering the power of the federal government to enter into contracts, Marshall, C. J., in *United States* v. *Maurice*, 2 Brock. 109, said:

> The United States is a government, and consequently a body politic and corporate, capable of attaining the objects for which it was created by the means which are necessary for their attainment. This great corporation was ordained and established by the American people, and endowed by them with great powers for important purposes.

Attorney General Bonaparte, in 26 Op. 447, 448, said: "The United States are a quasi corporation, capable of contracting, suing, receiving, and holding all manner of property and taking by devise," citing *Dugan* v. *United States*, 3 Wheat. 181; *United States* v. *Maurice*, 2 Brock. 109. It has

many of the attributes of a corporation, and is a "person" as defined by the Bankruptcy Act itself. As the word "person" includes corporation, and the United States government is a corporation, it follows that a debt owing to the United States is entitled to priority in payment under section 64(b)5 of the Bankruptcy Act, as being a debt owing to a person who, by a law of the United States (section 3466, Revised Statutes), is entitled to priority.

In appellant's argument, comparing the Act of 1898 with prior acts and asserting that because the United States was not expressly named in section 64(b)5 it was not intended that claims of the United States should have priority, he fails to take into consideration the fact that none of the prior acts contain a defining section as does the Act of 1898. This defining section (section 1(a)) rendered unnecessary the inclusion of the United States by name in section 64(b)5. It must be assumed also that the Congress in enacting the Act of 1898 was aware of the interpretation placed thereon by this court to the effect that the express inclusion of the United States in the prior section was a mere affirmation of an existing right and was placed there "to exclude the possibility of a different conclusion." *Lewis, Trustee,* v. *United States, supra.*

While it is true that this court in *Lewis, Trustee,* v. *United States* had under consideration the Bankruptcy Act of 1867, nevertheless, the statement in that decision that the priority clause in the Bank-

ruptcy Act was to be considered *in pari materia* with section 3466 Revised Statutes, was quoted with approval by this court in *Guarantee Company* v. *Title Guaranty Company,* 224 U. S. 152, 157–158, interpreting the Bankruptcy Act of 1898.

In *Guarantee Company* v. *Title Guaranty Company, supra,* this court sustained the preference of the United States under section 3466, Revised Statutes, to which the appellee was subrogated by section 3468, Revised Statutes, and held that section 64(b) of the Bankruptcy Act of 1898 postponed claims of the government, other than those for taxes, in favor of labor claims. That decision did not deny priority for claims of the government asserted in bankruptcy. It merely held that under the Act of 1898 a new order of priority is prescribed, and that under said Act wages due to any operative, clerk, or house servant are entitled to payment prior to the claims of the United States. It had been asserted in that case that the claim of the United States was entitled to priority over all other claims, and that the surety having paid the claim was entitled under section 3468, Revised Statutes, to the priority accorded the United States government. This court, however, held that claims for wages due clerks, servants, etc., were given priority over the claims of the United States, except for taxes. The necessary inference to be drawn from that decision is that while the United States is still entitled to priority over general creditors, under the Bankruptcy Act, read in con-

nection with section 3466, Revised Statutes, yet under the Act of 1898, wages due clerks and servants were expressly given priority over debts due the United States other than taxes. No other conclusion can be possibly drawn from this decision.

Referring to the decision of this court in *Guarantee Company* v. *Title Guaranty Company, supra,* Judge Learned Hand, of the District Court for the Southern District of New York, *In re Tidewater Coal Exchange* (opinion unpublished), said:

> It was there held that the priority of the United States yielded to the priorities established in Section 64 (b), and, though the precise reasoning is not specifically stated, this can be only because a debt due to the United States falls within Section 64 (b) (5), which is the only clause at all apposite, and which reads as follows: "Debts owing to any person who by the laws of the States or the United States is entitled to priority." This language fits precisely, because the United States is a corporation sovereign, and corporations are "persons" under Section 1 (a) (19). Moreover, so far as anyone has found, it is not only a "person" but the only "person * * * entitled to priority" under any law of the United States. If this is not an express mention of the United States in the statute, it is a very clear indication that its priorities are dependent upon the bankruptcy act. I conclude, therefore, not only that this is true, but that Revised Statutes, Section 3466, applies only because it is incorporated by ref-

> erence just as all laws of the States in *pari materia* are incorporated by the same section.

On appeal to the Circuit Court of Appeals, Second Circuit (*In re Tidewater Coal Exchange,* 280 Fed. 648, 650), it was held that the United States is to be regarded as a "person" within the meaning of section 64(b)5 of the Bankruptcy Act. The court said:

> We have no doubt that the United States is to be regarded as a person within the meaning of the clause cited, and can assert its priority as given to it under section 3466 of the Revised Statutes (Comp. St. Sec. 6372), which is reproduced in the margin. The priority secured to the United States is priority over all creditors. The statutory provision referred to is simply declaratory of the common-law rule which entitles a sovereign to priority over other creditors of an insolvent. *United States* v. *National Surety Co.* 254 U. S. 73, 75; 41 Sup. Ct. 29; 65 L. Ed. 143.

The Circuit Court of Appeals, Second Circuit, in that case denied the right of the Director General of Railroads, as a representative of the United States, to vote for a trustee because of the fact that section 56 of the Bankruptcy Act excludes preferred creditors from voting for trustees. Having accorded priority to the claim of the Director General as being a claim on behalf of the United States, it followed that the Director General, as such

preferred creditor, could not vote for a trustee under the provisions of the Bankruptcy Act.

That section 3466 Revised Statutes is to be read in connection with section 64(b)5 of the Bankruptcy Act of 1898 has been decided by the Circuit Court of Appeals for the Seventh Circuit *In re E. J. Hibner Oil Company,* 264 Fed. 667, and by the Circuit Court of Appeals for the Eighth Circuit *In re Western Implement Company,* 171 Fed. 81. The court *In re Hibner Oil Company,* page 668, said:

> If the claim is property of, and constitutes a debt due to the United States, then concededly its priority was properly found.

In the case of *In re Western Implement Company, supra,* the Circuit Court of Appeals for the 8th Circuit had under consideration a debt owing to the State of Minnesota, and made preferred under a statute of that State. In a *per curiam* opinion the court held that the claim of the State was a preferred one under section 64(b)5 of the Bankruptcy Act, stating that " it arrived at the same conclusion as did the District Court, and for the same reasons."

Judge Purdy in the District Court (166 Fed. 576, 582) reached the conclusion that the claim came under 64(b)5 and stated his reasons as follows:

> The word " persons," as defined by clause 19 of section 1 of the bankruptcy act, is as follows: "(19) Persons shall include cor-

porations"; and, again, the word "corporation" is defined by clause 6 of said section 1 of the bankruptcy law as follows: "Corporations shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, etc."

It can not be doubted that a state is a "body" having some of the powers and privileges of private corporations not possessed by individuals or partnerships; as, for example, the power or privilege of perpetual succession. If, therefore, the word "persons," as employed in clause 5, includes "corporations," and the word "corporations," as used in the bankruptcy law, means "all bodies having any of the powers and privileges" of private corporations not possessed by individuals or partnerships, then it would seem to follow as a necessary and inevitable conclusion that a "state" is a "person" within the meaning of the 5th clause of subdivision "b" of the 64th section of the bankruptcy act.

Further on in the same opinion (pp. 583–584) the Court, after quoting Sec. 3466, U. S. R. S., said:

This statute was enacted on March 3, 1797, c. 20, 1 Stat. 515, and has remained in force until the present day. It expresses the general policy of this government with respect to the preference of debts due to the United States over debts due to its citizens. The various states of the Union have by legislative enactment declared the same public pol-

> icy with respect to preferences of debts due the state, and this public policy of the various states has been recognized by Congress in at least one bankruptcy law, that of 1867. It is difficult to conceive that the Congress, when they enacted the national bankruptcy act of 1898, intended to render nugatory this policy of the federal and state government which had been so distinctly recognized for so many years, and that, too, by a mere failure to insert some express provision covering the subject. In my judgment, clause 5 of subdivision "b" of section 64 was intended by Congress to fully preserve not only the rights of the several states, but the rights of the United States, with respect to priorities of debts due from bankrupt estates.

And still further on, at page 584:

> The bankruptcy act of 1898 contains no express provisions preserving in so many words the priority of debts due the United States, and if priority is to be accorded to such debts the authority therefor must be found in clause 5, subd. "b," § 64, of the bankruptcy act of 1898. I feel satisfied that the United States must be regarded as a "person" within the meaning of that clause (*In re Stoever* (D. C.), 127 Fed. 394); and by a parity of reasoning I am forced to the conclusion that a state should likewise be regarded as a "person" within the meaning of this law.

In *United States* v. *Wood,* 290 Fed. 109, 114, the Circuit Court of Appeals, Second Circuit, cites

with approval Judge Learned Hand's opinion in the Tidewater Coal Exchange case, and reaffirms its own ruling in the same case that the United States is a "person" under the Bankruptcy Act.

The foregoing decisions established beyond doubt that the United States is a "person" as defined by the Bankruptcy Act, and, under the provisions of section 64(b)5 of that Act, read in connection with section 3466 Revised Statutes, is entitled to preference in the payment of its claims filed in bankruptcy proceedings.

II

The omission from the Bankruptcy Act of 1898 of the express provision giving priority to ordinary debts of the United States, contained in the Bankruptcy Act of 1867, has no significance other than changing the order of priorities under the Act.

In *Lewis* v. *United States,* 92 U. S. 618, 622, this court held that the United States was not bound by the Bankruptcy Act of 1867 and that the provision in that statute as to preference was *in pari materia* with the several acts giving priority to the United States. The Court expressed the opinion that the provision as to priority of debts due to the United States in the act of 1867 was put in "to recognize and reaffirm the rights which those statutes (Sec. 3466, etc.) give and to exclude the possibility of a different conclusion." In other words, this provision in the Bankruptcy Act of 1867 was redundant and could be treated as surplusage. This being so it would seem that no sig-

nificance should attach to the fact that this clause was omitted from the act of 1898. When Congress framed the preference section of the Bankruptcy Act of 1898, it clearly intended to make a change in the order of priorities of preferred debts from that in the Act of 1867, and provided in section 64(b)5 that government claims, other than those for taxes, should be paid by the trustee after labor claims. From the wording of the preference section in the Act of 1898, one is led to believe that, in adapting the preference section of the Act of 1867 to the new Act, the framers decided to cut out redundancy and surplusage and embrace debts made preferable by statutes in an omnibus clause, 64(b)5.

In *Guarantee Company* v. *Title Guaranty Company, supra,* this Court referred to the ruling made in *Lewis* v. *United States, supra* and compared the preference provisions in the Bankruptcy Acts of 1867 and 1898 with section 3466, R. S. It sustained the preference of the United States under 3466 to which the appellee was subrogated by section 3468, R. S., and held that section 64(b) of the bankruptcy act of 1898 postponed claims of the Government, other than those for taxes, in favor of labor claims. It is clear the court considered the claim a preferred one under the Bankruptcy Act and the only question was its relative position in the preferred class. This is shown in two sentences almost at the end of the opinion (p. 160) in which Mr. Justice McKenna, writing for the Court, said:

> The policy which dictated it (giving priority to labor claims) was beneficient and well might induce a *postponement* of the claims, even of the sovereign in favor of those who necessarily depended upon their daily labor. And to give such claims priority could in no case seriously affect the sovereign. [Italics ours.]

In *United States* v. *National Surety Company,* 254 U. S. 73, the question under consideration was whether or not a surety which had paid the amount of its liability on a bond of a bankrupt and thus became entitled under section 3468, R. S., to the government's priority, was entitled to equal priority with the Government under 3466, R. S. Held, that it was not. In that case this court did not question the government's priority under section 3466. The claim was not a tax claim, but the controversy arose in the matter of proving it under the Bankruptcy Act of 1898. Mr. Justice Brandeis, speaking for the court, said, page 76:

> To accord such equality would abridge the priority expressly conferred upon the Government.

In the case of *In re Anderson,* 279 Fed. 525, the Circuit Court of Appeals, 2nd Circuit, speaking of the government's preference in bankruptcy proceedings, says at page 527:

> Debts due to the United States are entitled to priority of payment, U. S. Revised Statutes, Sec. 3466 (Comp. St. Sec. 6372). * * * The order of payment to the

> United States is next after the wages due workmen, clerks, or servants which have been earned within three months before the date of the commencement of the proceedings.

What was said by the Circuit Court of Appeals *In re Anderson, supra,* is a concise statement of the law as held by this court in *Guarantee Company* v. *Title Guaranty Company, supra,* and is sustained by the decision of this Court in *United States* v. *National Surety Company, supra.* The latter case involved claims filed in bankruptcy, both parties claiming priority under the provisions of the bankruptcy act. The referee allowed priority for the claim of the United States and accorded equal priority under section 3468, R. S., to the National Surety Company. As the estate was less than the claim of the United States the ruling of the referee would result in the United States and the surety company prorating their claims. While the decision of this court turned on the question of whether the surety company having paid to the government the amount of its bond was entitled under section 3468 to equal priority with the United States, this court held that the claim of the United States must be first satisfied. However, as it has been held that the United States must submit its claims against a bankrupt estate to the referee in bankruptcy, if the government was not entitled to priority under the Bankruptcy Act, both the United States and the surety company would be general creditors only and would prorate

their claims. It is submitted, therefore, that the decision of this Court in the case of *United States* v. *National Surety Company, supra,* is an affirmance of the government's right to priority over general creditors in the payment of its claims filed in bankruptcy proceedings.

In the case of *In re Stoever,* 127 Fed. 394, the District Court for the Eastern District of Pennsylvania in discussing the priority section of the Bankruptcy Act and section 3466 of the Revised Statutes said, page 398:

> What was said in *Lewis* v. *United States* is, I think, equally true of the act of 1898. Section 64, cl. " b " (5), which gives priority to " debts owing to any person who by the laws of the states or the United States is entitled to priority," is in pari materia with Sections 3466 and 3467 of the Revised Statutes, and adds nothing to the rights given by those sections nor takes anything away.

Petitioner in denying the right of the United States to priority under the Bankruptcy Act relies generally upon the recent decision of the Circuit Court of Appeals for the Fourth Circuit in *Davis* v. *Pringle,* 1 Fed. (2nd) 860, and upon the decision of this court in what is known as the *Sloan Shipyards case,* 258 U. S. 549. Case No. 526, *United States Shipping Board Emergency Fleet Corporation* v. *Wood, Trustee in Bankruptcy of the Easternshore Shipbuilding Company, Bankrupt,* argued and decided along with the *Sloan Shipyards case,* involved

the question whether the Emergency Fleet Corporation, having filed its claim in the bankruptcy court, was entitled to the priorities of the United States under the Bankruptcy Act. This Court, on page 570, held that it was not so entitled. The Court said:

> The claim was presented by the Fleet Corporation in its own name, but was put forward by it as an instrumentality of the Government of the United States. It was denied successively by the referee, the District Court, and the Circuit Court of Appeals on the ground that the Fleet Corporation was a distinct entity, and that, whatever might be the law as to a direct claim of the United States, the Fleet Corporation stood like other creditors and was not to be preferred.

This ruling is consistent with the decision in the *Sloan Shipyards Corporation* and the *Astoria Marine Iron Works cases,* where it was held that the Emergency Fleet Corporation is a separate entity, capable of making contracts and being sued thereon, notwithstanding the fact that it is a federal agency. Having held the Fleet Corporation to be a separate and distinct corporation, and, therefore, suable, the court could not consistently hold that it would be entitled to the priority accorded to the United States under the Bankruptcy Act. The minority dissented from the decision of the majority court that the Fleet Corporation is suable, but concurred in the majority opinion that the Fleet Corporation is not entitled to priority

under the Bankruptcy Act, basing its decision on the ground that the United States itself is not so entitled. The petitioner makes the point that as to the question of priority the dissenting opinion is a concurring one, but the majority court did not consider the question of the priority of the United States under the Bankruptcy Act, and did not decide that question.

In fact it can not be held logically that the United States is without priority under the Bankruptcy Act unless it is also held that section 3466 Revised Statutes has been repealed by the Bankruptcy Act of 1898. Attention is invited to the fact that this Court has heretofore recognized section 3466 to be still in effect, unrepealed and unmodified except that by section 64(b) the priority originally given by section 3466 has been subordinated by the Bankruptcy Act to claims for wages due clerks, servants, etc. *Guarantee Company* v. *Title Guaranty Company*, 224 U. S. 152; *United States* v. *National Surety Company*, 254 U. S. 73; *United States* v. *Oklahoma*, 261 U. S. 253, 262.

As against the decisions heretofore cited stands one case, that of the Circuit Court of Appeals, Fourth Circuit, in *In re Pringle*, 1 Fed. (2nd) 860, on which the petitioner places his main reliance. The court there decided that a claim of the Director General of Railroads, although a debt due the United States of the character given preference under section 3466, is not entitled to preference in payment under the Bankruptcy Act of 1898, for

the reason that the Bankruptcy Act completely covers all priorities and distribution of assets and supplants and annuls all previous inconsistent statutes. The court bases its decision on its interpretation of section 64(b)5 of the Bankruptcy Act that the United States is not a " person " in contemplation of paragraph 5, and therefore is not accorded priority under that Act.

This decision, if sustained, practically nullifies section 3466 by limiting its application to receivership and insolvency proceedings not administered by the Bankruptcy Courts. While the Circuit Court of Appeals in that case cites the decision of this court in *Guarantee Company* v. *Title Guaranty Company, supra,* it is submitted that decision does not in any respect sustain the decision of the Circuit Court of Appeals in the *Davis* v. *Pringle* case.

The statement of the court in *Davis* v. *Pringle,* page 863, that " The United States and the several States of the United States are not persons and are not commonly thought of as persons * * * " is not sustained by any citation of authority. On the other hand, attention is respectfully invited to the decision of this court in *Stanley* v. *Schwalby,* 147 U. S. 508, 517, where the court said:

> Of course, the United States were not bound by the laws of the State, yet the word " person " in the statute would include them as a body politic and corporate.

The decision in the *Pringle case* stands alone, opposed by the decisions of the Circuit Courts of

Appeals for the Second Circuit (*In re Tidewater Coal Exchange,* 280 Fed. 648, affirmed in *Borland, Trustee* v. *United States,* now submitted); for the Seventh Circuit (*In re Hibner Oil Company,* 264 Fed. 667); and for the Eighth Circuit (*In re Western Implement Company,* 166 Fed. 576), and by the decisions of this court in *Guarantee Company* v. *Title Guaranty Company, supra,* and *United States* v. *National Surety Company, supra.*

CONCLUSION

It is submitted, therefore, that section 64(b)5 of the Bankruptcy Act of 1898 is *in pari materia* with section 3466, Revised Statutes; that when read together these statutes entitle the United States to priority for its claims filed in bankruptcy; that this view has heretofore been sustained by this Court in *Guarantee Company* v. *Title Guaranty Company, supra,* and should be reaffirmed in this case.

JAMES M. BECK,
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HARVEY B. COX,
Special Assistant to the Attorney General.

MAY, 1925.

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DAVIS, FEDERAL AGENT FOR CLAIMS DUE IN OPERATION OF ATLANTIC COAST LINE RAILROAD, *v.* PRINGLE, TRUSTEE IN BANKRUPTCY OF ESTATE OF BOYD CO., INC.

DAVIS, FEDERAL AGENT FOR CLAIMS DUE IN OPERATION OF SEABOARD AIR LINE RAILWAY COMPANY, *v.* PRINGLE, TRUSTEE IN BANKRUPTCY OF ESTATE OF BOYD CO., INC.

BORLAND, TRUSTEE IN BANKRUPTCY, *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURTS OF APPEALS FOR THE SECOND AND FOURTH CIRCUITS.

Nos. 786 and 787 argued, No. 1085 submitted, May 4, 1925.—Decided May 25, 1925.

1. Under the Bankruptcy Act, as amended February 5, 1903, and June 15, 1906, debts owed the United States are not entitled to priority. So *held* of claims for freight, storage and demurrage, growing out of federal control of railroads, and claims on bills of exchange and checks. P. 317.
2. Section 64 (b) of the Bankruptcy Act, giving priority to debts "owing to any person who by the laws of the States or the United States is entitled to priority", *construed* with other provisions of this and prior bankruptcy acts, and *held* not to include the United States as a "person" and thus make applicable the priority provision of Rev. Stats. § 3466. *Id.*

Nos. 786, 787; 1 Fed. (2d) 860, 864, affirmed.
No. 1085, reversed.

CERTIORARI to three judgments of the Circuit Court of Appeals, the first two denying and the third allowing claims of the United States to priority of payment in bankruptcy proceedings. See also *In re Tidewater Coal Exchange*, 280 Fed. 648.

Mr. Jerome Michael, with whom the *Solicitor General* and *Messrs. A. A. McLaughlin, Alex Koplin, Henry Gale* and *Arthur M. Loeb* were on the brief, for petitioner in Nos. 786 and 787.

Messrs. N. B. Barnwell and *Godfrey Goldmark* for respondent, in Nos. 786 and 787.

Mr. Godfrey Goldmark, for petitioner in No. 1085, submitted.

The Solicitor General, Mr. Assistant Attorney General Letts and *Mr. Harvey B. Cox,* Special Assistant to the Attorney General, for the United States, submitted in No. 1085.

Mr. Justice Holmes delivered the opinion of the Court.

The first and second of these cases are claims for freight, storage and demurrage proved in bankruptcy proceedings by the federal agent, for which the agent asserts priority on the ground that such claims arising during federal control of the railroads in 1918 are debts due to the United States and are preferred by Rev. Stats. § 3466 and by the Bankruptcy Act of July 1, 1898, c. 541, § 64, amended by Acts of February 5, 1903, c. 487, § 14, 32 Stat. 800, and June 15, 1906, c. 3333, 34 Stat. 267. The third is a claim by the United States for amounts paid by the Postmaster General to the bankrupts for bills of exchange and checks drawn by the bankrupts and unpaid, together with protest fees, &c., as to which priority is asserted on the same grounds. The priority was denied in the first two cases by the Circuit Court of Appeals for the Fourth Circuit. 1 Fed. (2d) 860; *ibid.* 864. But it was allowed in the Second Circuit without any reported opinion, following an earlier case in that Circuit, *In re Tidewater Coal Exchange,* 280 Fed. 648.

All the three cases depend upon the question whether the Government has a right to the priority it claims. If that is denied the additional inquiries that would be necessary before the federal agent could prevail in the railroad cases need not be gone into. Therefore we take up that first. It may be assumed that the priority must be found if at all in the Bankruptcy Act and in its supposed incorporation of Rev. Stats. § 3466. That Act, as was said in *Guarantee Title & Trust Co.* v. *Title Guaranty & Surety Co.*, 224 U. S. 152, 160, "takes into consideration . . . the whole range of indebtedness of the bankrupt, national, state and individual, and assigns the order of payment." It was passed with the United States in the mind of Congress as is shown by the exception of debts due as taxes levied by the United States from the discharge in § 17-a(1), the limitation on debts owing to the United States as a penalty in § 57-j, and the provisions as to priority in § 64 with which we are principally concerned. By 'a' of that section "The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States . . . in advance of the payment of dividends to creditors." This taken by itself would seem to exclude other debts. But the section goes on in 'b' to give priority in the order named to "(5) debts owing to any person who by the laws of the States or the United States is entitled to priority," and the Government argues that by § 1(19) 'persons' shall include corporations and that the United States is a corporation and therefore within these words. Being within them, it is said, it is entitled to priority by a law of the United States, the well known Rev. Stat. § 3466. It is said that no other person except the United States itself can be discovered who is given the right by its laws.

We attach little value to this logical concatenation as against the direct effect of § 64, taken according to the

normal usages of speech. It is incredible that after the conspicuous mention of the United States in the first place at the beginning of the section and the grant of a limited priority, Congress should have intended to smuggle in a general preference by muffled words at the end. The States are mentioned in (5) before the United States, showing that their laws were primarily in mind. The United States seems added to avoid some possibly overlooked case. The ordinary dignities of speech would have led to the mention of the United States at the beginning of the clause, if within its purview. Elsewhere in cases of possible doubt when the Act means the United States it says the United States. We are of opinion that to extend the definition of 'person' here to the United States would be 'inconsistent with the context' and therefore is within the exception at the beginning of § 1. We are confirmed in our opinion by the fact that in earlier bankruptcy acts a priority was given to the United States in express terms, and that, for instance in the Act of March 2, 1867, c. 176, § 28; 14 Stat. 517, 530, 'Fifth', persons entitled to priority by the laws of the United States are mentioned when the United States could not have been meant, having been fully secured by the same section, 'Second.' If it be legitimate to look at them (*Schall* v. *Camors*, 251 U. S. 239, 250) the bills that were before Congress when the present law was passed contained the clause relied upon but showed by their context that they could not refer to the United States. There was a change of purpose from that of the earlier acts. *Guarantee Title & Trust Co.* v. *Title Guaranty & Surety Co.*, 224 U. S. 152, 158, *et seq.* Public opinion as to the peculiar rights and preferences due to the sovereign has changed. We agree with the view of this point taken by the Chief Justice and Justices Van Devanter and Clarke in *United States Shipping Board Emergency Fleet Corporation* v. *Wood*, 258 U. S. 549,

574, at a time when it was not necessary for the majority to speak upon it. The priority claimed by the United States is not given to it by the law.

Decrees in 786 and 787 affirmed.
Decree in 1085 reversed.

MR. JUSTICE SHIRAS was absent and took no part.